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No. 09-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JIM G. PRICE,

Petitioner,

v.

UNITED STATES BANKRUPTCY COURT,
NORTHERN DISTRICT OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JEROME FISHKIN
FISHKIN & SLATTER LLP
1111 Civic Drive, Suite 215
Walnut Creek, CA 94596
(925) 944-5600

Counsel for Petitioner

224075

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether a single judge of the Bankruptcy Court, who does not have the power to determine who is admitted to practice before the Bankruptcy Court, may suspend an attorney from practicing before the entire Bankruptcy Court.

Whether a judge of the Bankruptcy Court may suspend an attorney from practice before the entire court, without complying with the relevant U S District Court's own rules for discipline procedures.

Whether the Bankruptcy Court has the inherent power to discipline an attorney, even though that Court does not have the power to regulate attorney admissions before that court.

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JURISDICTION

This is a petition to review the opinion of the Ninth Circuit that was filed on April 28, 2009. This petition is brought in accord with 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

28 U.S.C. § 157 pertaining to authority of U.S. District Courts over Bankruptcy Courts

28 U.S.C. § 158 pertaining to Bankruptcy Court powers

28 U.S.C. § 2075 pertaining to Supreme Court rule making powers for Bankruptcy Court

Local Rule 11-6, U.S. District Court, Northern District of California, pertaining to discipline procedures

(App. D).

STATEMENT OF THE CASE

This is an attorney disciplinary case. Attorney Jim Price was disciplined by a Judge of the United States Bankruptcy Court for the Northern District of California. Mr. Price was not afforded the disciplinary procedures required by Local Rule 11-6 of that United States District Court. Mr. Price has consistently challenged the power of the Bankruptcy Court to impose attorney discipline on him. The power to discipline belongs in the court which has the power to admit, that is, the United States District Court.

The power of the Bankruptcy Judge to impose discipline was upheld by the Bankruptcy Appellate Panel for the Ninth Circuit. The BAP in turn was upheld by the United States Court of Appeal for the Ninth Circuit.

The Bankruptcy Court asserted jurisdiction via 28 U.S.C. § 1334, 28 U.S.C. § 157(b)(1), and 28 U.S.C. § 157(b)(2)(A). The BAP asserted jurisdiction via 28 U.S.C. § 158(c). Mr. Price denies that the Bankruptcy Courts have jurisdiction to discipline him on any grounds.

REASONS FOR GRANTING THE PETITION

The power of discipline is an inherent power of courts that admitted the attorney, not the power of a subordinate court

Courts have certain inherent powers over attorneys to control their proceedings. Those powers may include, as appropriate, the power to sanction an attorney, the power to hold an attorney in contempt, the power to disqualify an attorney, and the power to discipline an attorney. In the latter instance, however, the power of discipline is an inherent power of courts that admitted the attorney. *Chambers v NASCO* (1991), 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27. In *Chambers*, this Court stated that the inherent power of a federal court includes the power "to control admission to its bar and to discipline attorneys who appear before it." But the Bankruptcy Court does not have the power to admit an attorney. That power reposes in the District Court, of which the Bankruptcy Court is a subordinate body.

The Ninth Circuit held that Mr. Price's discipline case was a core proceeding under 28 U.S.C. § 157(b)(2)(A), *sub nom In Re Lehtinen*, 564 F.3d at 1057. In doing so, it distinguished a contrary First Circuit opinion, *In Re Sheridan* (1st Cir. 2004) 362 F.3d 96. *Sheridan* ruled that a discipline case was non Core, and that the Bankruptcy Court must refer its findings and conclusions to the appropriate District Court for de novo review.

The courts below fail to explain how a court that lacks the power to admit an attorney to practice nevertheless would have an inherent power to suspend or disbar that attorney. As discussed in *Eash v Riggins Trucking* (3rd Cir. 1985) 757 F.2d 557, 562 ". . . cases that have employed inherent power appear to use that generic term to describe several distinguishable court powers. . . . To compound this lack of specificity, courts have relied occasionally on precedents involving one form of power to support the court's use of another." (internal citations omitted).

In an otherwise unrelated case, the Ninth Circuit made a statement consistent with the foregoing sentiment: "We have not always maintained a clear distinction between a sanction and attorney discipline." *Weissman v Quail Lodge* (9th Cir. 1999) 179 F.3d 1194, 1198. The Courts below begin with an inherent powers statement, then use citations to sanction and contempt cases to support the right of a subordinate court to suspend and disbar.

All courts possess the inherent power to impose sanctions on errant attorneys. *Flaksa v Little River* (5th Cir. 1958) 389 F.2d 885, 888. This power is based on the need of a court to protect the orderly administration of justice and the dignity of the tribunal. *Kleiner v First National Bank* (11th Cir. 1985) 751 F.2d 1193. *Kleiner* describes that power as the ability to assess attorney fees and costs, disqualify counsel, and impose monetary penalties payable to the Court.

Kleiner goes on to state the inherent power to discipline stems from a different source than the power

to impose sanctions. That source must be the power to admit. In fact, the very first attorney case in this Court declared the inherent power of the court to discipline an attorney. *Ex Parte Burr* (1824) 9 Wheat 529, 531; 6 L.Ed. 152. But Mr. Burr was a member of the Bar of the underlying court, much as Mr. Price is a member of the Bar of the U.S. District Court. There is no separate "Bar" of the Bankruptcy Court.

Discipline was erroneously held to be a "Core" proceeding

As recited above, the Ninth Circuit held that Mr. Price's discipline case was a core proceeding under 28 U.S.C. § 157(b)(2)(A), and distinguished a contrary First Circuit opinion in *In Re Sheridan, supra.* *Lehtinen*, the Ninth Circuit opinion below, distinguished *Sheridan* on the grounds that *Sheridan* involved multiple cases and *Lehtinen* involved only one case. In doing so, *Lehtinen* ignores the difference between discipline and sanctions. *Sheridan*'s rationale was stronger. Sanctions or disqualification or contempt are all powers that a court uses to control conduct in a specific case before the specific judge. Discipline is an attempt to control behavior in future cases, and in front of the entire court, not just one judge.

Modern disciplinary law has separated the power to discipline from the judge who brings the charges. Thus, the American Bar Association has promulgated the "Model Federal Rules of Disciplinary Enforcement." Rule V-D of those Model Rules recites:

> D. Upon the respondent-attorney's answer to the order to show cause, if any issue of fact is

> raised or the respondent-attorney wishes to be heard in mitigation this Court shall set the matter for prompt hearing before one or more Judges of this Court, provided however that **if the disciplinary proceeding is predicated upon the complaint of a Judge of this Court the hearing shall be conducted before a panel of three other Judges** of this Court appointed by the Chief Judge, or, if there are less than three Judges eligible to serve or the Chief Judge is the complainant, by the Chief Judge of the Court of Appeals for this Circuit.

(Emphasis added.)

In the absence of a Supreme Court or District Court rule, Bankruptcy courts have no power to discipline attorneys

This Court has the power to promulgate rules for Bankruptcy Courts, 28 U.S.C. § 2075. This court has not promulgated rules for disciplinary procedures in the Bankruptcy Courts. Therefore, the Bankruptcy Courts should follow the discipline rules of the U.S. District Court in which it is the subordinate unit.

That Court, the United States District Court for the Northern District of California, has promulgated Local Rule 11-6, disciplinary rules for attorneys admitted to practice before that court. The procedure followed by the Bankruptcy Court violates those rules.

"The bankruptcy courts are, of course, units of the district courts. *See* 28 U.S.C. § 151. District courts are empowered to make local rules governing bankruptcy procedure within the district and may also authorize bankruptcy courts to issue local rules. *See* Fed. R. Bankr. P. 9029. The District regulates practice before . . . bankruptcy courts. . . ." *In Re Poole* (9th Cir. 2000) 222 F.3d 618, 621.

There is no uniform federal procedure for attorney discipline. "The individual judicial districts are free to define the rules to be followed and the grounds for punishment. . . ." *Weissman*, *supra*, 179 F.3d at 1198. The United States District Court for the Northern District of California has done so in its Local Rule 11-6. That Court has not promulgated any rule under 28 U.S.C. § 157 that permits the Bankruptcy Court to handle its own disciplinary case.

CONCLUSION

The inherent power of a Bankruptcy Court cannot include the power to discipline attorneys. The power to discipline attorneys is inherent in the power to admit them in the first place. The Bankruptcy Court's powers to sanction and disqualify attorneys, and to hold them in contempt, are adequate to give Bankruptcy Judges control of their courtrooms and proceedings. Furthermore, the U.S. District Court has its own rules pertaining to discipline. The subordinate Bankruptcy Court should not be permitted to bypass the U.S. District's rules.

Finally, the First Circuit's rationale in *Sheridan* is superior to the Ninth Circuit's rationale in *Lehtinen*, and therefore the two contradictory circuit opinions should be resolved in favor of *Sheridan*.

Respectfully submitted,

JEROME FISHKIN
FISHKIN & SLATTER LLP
1111 Civic Drive, Suite 215
Walnut Creek, CA 94596
(925) 944-5600

Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 28, 2009

UNITED STATES COURT OF APPEALS NINTH CIRCUIT

No. 05-17421.

In the Matter of Patricia Ann **LEHTINEN**,

Debtor,

Jim G. **Price**,

Appellant,

v.

Patricia Ann **Lehtinen**; Martha Bronitsky, Chapter 13 Standing Trustee; United States Trustee,

Appellees.

Submitted Feb. 12, 2009.*

Filed April 28, 2009.

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* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).

Appendix A

Before: D.W. NELSON, Senior District Judge, W. FLETCHER and RICHARD C. TALLMAN, Circuit Judges.

D.W. NELSON, Senior District Judge:

Appellant Jim Price appeals the Bankruptcy Appellate Panel's ("BAP") decision affirming the bankruptcy court's order suspending him. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In October or November 2003, debtor Patricia Lehtinen ("debtor") retained Jim Price to represent her in a chapter 13 proceeding. Debtor was primarily concerned with selling her house to repay certain debts.

Debtor's petition was filed before the U.S. Bankruptcy Court, Northern District of California. On February 19, 2004, debtor attended the 11 U.S.C. § 341 meeting of the creditors. Price did not attend this meeting and sent a contract attorney instead. Debtor alleges that Price failed to inform her that he would not attend.

Price also referred debtor to Rene Boisvert of Boulevard Equity Group so that debtor could obtain a loan to fix up her house. Boisvert told debtor that Boulevard would lend her the funds and pay off the first deed of trust on her house, and that Boulevard would be repaid from the proceeds of the sale, but only if debtor retained Price as a broker for the sale. Debtor

never completed the loan documents, and sold her house through another realtor without informing Price.

The trustee served notice of a June 3, 2004, confirmation hearing on Price and debtor. Debtor called the trustee's office in April 2004, and was advised that she had until the confirmation hearing to either sell her home, refinance her home, or amend her plan. She was also advised that she was required to attend the hearing. According to debtor, this was the first time she had heard of the confirmation hearing because Price had failed to notify her.

Price did not appear at the June 3, 2004, confirmation hearing. At the request of another client, he had agreed to appear in another court even though he knew it conflicted with the confirmation hearing. He did not request a continuance of either hearing. Debtor attended the confirmation hearing alone, and informed the court that her house was pending sale. The court confirmed the plan with a 100% payout to unsecured creditors.

Without checking the outcome of the confirmation hearing, Price sent a letter to debtor on June 4, 2004, stating that her case had been dismissed, that he could refile another case for her or help her to sell the house, and that the bank could proceed with the foreclosure on her house. Price admits that sending the letter was a "mistake." He assumed the case had been dismissed because he missed the hearing and because debtor was behind on her payments to the trustee. Price testified

that he sent the letter "to urge . . . [debtor] to do something."

On June 10, 2004, the bankruptcy court issued an order to show cause why Price should not disgorge all or part of his $1,500 fee for failure to appear at the meeting of the creditors and the confirmation hearing (hereinafter "First OSC"). On July 7, 2004, the bankruptcy court held a hearing on these issues. On July 8, 2004, it entered an order resolving both absences by ordering Price to disgorge $300 of the $1,500 fee.

After the hearing, but before the issuance of the order, debtor sent a letter to the bankruptcy court stating: (1) that Price never informed her of the confirmation hearing date; (2) that she learned of the hearing date from the trustee; (3) that Price was a real estate broker and pressured debtor to list her house with his brokerage firm; and (4) that Price referred debtor to his friend for a home improvement loan, who had conditioned the loan on her engaging Price as her broker. Debtor also attached the June 4, 2004, letter from Price.

Based on debtor's letter, the bankruptcy court issued a second order to show cause "why . . . [Price] should not be sanctioned pursuant to this court's inherent sanction power . . . for bad faith conduct," and "why he should not be suspended or disbarred from practice in this court" (hereinafter "Second OSC"). The Second OSC identified four instances of alleged misconduct: (1) Price's failure to attend and to inform

debtor of her confirmation hearing; (2) the pressuring of debtor to list her house for sale with his brokerage firm; (3) the lender's condition of retaining Price as the broker for the loan transaction; and (4) his letter to debtor falsely informing her that her bankruptcy case had been dismissed and that a foreclosure sale was imminent. The Second OSC also stated that "the facts point to a clear conflict of interest between Mr. Price acting as the debtor's lawyer, soliciting the debtor to use his services as a real estate broker, and serving as a loan broker." Moreover, it described the evidence required regarding the sanctionable conduct. The Second OSC, however, did not identify applicable rules or sections.

The bankruptcy court held the Second OSC hearing on July 26, 2004. On October 22, 2004, it ordered Price to disgorge the balance of the $1,500 fee and suspended him from practicing before the bankruptcy court of the Northern District of California for three months. It concluded that Price violated several parts of the California Rules of Professional Conduct and the California Business & Professions Code.

On October 29, 2004, Price filed an appeal and obtained a stay of the suspension with the BAP. On October 11, 2005, the BAP concluded that the bankruptcy court "was within its authority in sanctioning Price, and afforded him due process," but vacated the suspension and remanded to the bankruptcy court for consideration of the American Bar Association Standards in disciplining Price. *Price v.*

Lehtinen (In re Lehtinen), 332 B.R. 404, 417 (9th Cir. BAP 2005).

On November 10, 2005, Price appealed to this court. No answering brief was filed.

JURISDICTION

We have jurisdiction over "final decisions" of the BAP under 28 U.S.C. § 158(d). Although there is some question as to the finality of the BAP's decision because the BAP vacated the portion of the bankruptcy court's order suspending Price and remanded for further proceedings, *see Foothill Capital Corp. v. Clare's Food Mkt., Inc. (In re Coupon Clearing Serv., Inc.)*, 113 F.3d 1091, 1098 (9th Cir.1997), we have jurisdiction over a non-final order in a bankruptcy case where "the appeal concerns primarily a question of law," *DeMarah v. United States (In re DeMarah)*, 62 F.3d 1248, 1250(9th Cir.1995); *accord Bonner Mall P'ship v. U.S. Bancorp Mortgage Co. (In re Bonner Mall P'ship)*, 2 F.3d 899, 904(9th Cir.1993), *cert. granted*, 510 U.S. 1039, 114 S.Ct. 681, 126 L.Ed.2d 648 (1994), *dismissed as moot*, 513 U.S. 18, 29, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994). This case concerns the bankruptcy court's power to sanction. Because this is a purely legal question, we have jurisdiction. *See Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1187 (9th Cir.2003).

Although Price argues that the proceeding is non-core, the acts and events upon which his suspension was predicated occurred in the course of his representation

of debtor in matters central to the administration of her case. As such, the disciplinary hearing fits well within the ambit of a core proceeding. 28 U.S.C. § 157(b)(2)(A).[1]

STANDARD OF REVIEW

"This court independently reviews the bankruptcy court's rulings on appeal from the BAP." *Miller v. Cardinale (In re DeVille)*, 361 F.3d 539, 547 (9th Cir.2004). "This court reviews an award of sanctions for an abuse of discretion." *Id.* Due process challenges are reviewed de novo. *Willamette Waterfront, Ltd. v. Victoria Station Inc. (In re Victoria Station Inc.)*, 875 F.2d 1380, 1382 (9th Cir.1989). A court's interpretation and application of a local rule is reviewed for abuse of discretion. *United States v. Heller*, 551 F.3d 1108, 1111(9th Cir.2009).

DISCUSSION

Price argues the BAP's decision should be reversed because: (1) the bankruptcy court lacked the power to suspend him; (2) he was not accorded due process; and (3) the bankruptcy court abused its discretion by failing to follow N.D. Cal. Civ. R. 11-6. We address each argument in turn.

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1. Price relies on *Sheridan v. Michels (In re Sheridan)*, 362 F.3d 96 (1st Cir.2004), but that case is distinguishable because the bankruptcy court there held an omnibus disciplinary hearing (concerning several of the attorney's unrelated cases, many of which were closed), and the First Circuit found that such a proceeding was non-core, *id.* at 107-08. The circumstances here are clearly different.

Appendix A

I. The Bankruptcy Court's Inherent Power to Suspend Attorneys

Bankruptcy courts generally have the power to sanction attorneys pursuant to (1) their civil contempt authority under 11 U.S.C. § 105(a); and (2) their inherent sanction authority. *Dyer*, 322 F.3d at 1192-93, 1196. The bankruptcy court sanctioned Price under its "inherent sanction powers."

In *Chambers v. NASCO, Inc.*, the Supreme Court held that the inherent power of a federal court permits it, *inter alia*, "to control admission to its bar and to discipline attorneys who appear before it." 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). In *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.)*, this court held that bankruptcy courts also "have the inherent power to sanction that *Chambers* recognized exists within Article III courts." 77 F.3d 278, 284 (9th Cir.1996). Although a simple reading of both *Chambers* and *Caldwell* suggests that the bankruptcy court has the power to suspend attorneys, this court's subsequent cases have limited the scope of the bankruptcy court's inherent power, *see, e.g., Dyer*, 322 F.3d at 1197, warranting further analysis.

A bankruptcy court's inherent power allows it to sanction "bad faith" or "willful misconduct," even in the absence of express statutory authority to do so. *Id.* at 1196. It also "allows a bankruptcy court to deter and provide compensation for a broad range of improper litigation tactics." *Id.* (citing *Fink v. Gomez*, 239 F.3d 989, 992-93 (9th Cir.2001)).

Appendix A

The inherent sanction authority differs from the statutory civil contempt authority in at least two ways. First, with the inherent power, a bankruptcy court may sanction a "broad range" of conduct, unlike the "[c]ivil contempt authority[, which only] allows a court to remedy a violation of a specific order (including 'automatic' orders, such as the automatic stay or discharge injunction)." *Id.* Second, unlike the civil contempt authority, "[b]efore imposing sanctions under its inherent sanctioning authority, a court must make an explicit finding of bad faith or willful misconduct." *Id.* (citing *Fink*, 239 F.3d at 992-93). "[B]ad faith or willful misconduct consists of something more egregious than mere negligence or recklessness." *Id.* (citing *Fink*, 239 F.3d at 993-94).

"Because of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers*, 501 U.S. at 44, 111 S.Ct. 2123. Thus, like the bankruptcy court's civil contempt authority, the inherent sanction authority "does not authorize significant punitive damages." *Dyer*, 322 F.3d at 1197(noting that this court has "refrained from authorizing a punitive damage award under the bankruptcy court's inherent sanction authority"). Punitive sanctions are prohibited, at least in part, because the bankruptcy court cannot provide the due process protections that a criminal defendant is ordinarily entitled to, such as a right to a jury trial. *Id.* at 1194; *cf. F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1139(9th Cir.2001) ("[W]hen a court uses its inherent powers to impose sanctions that are criminal in nature, it must

provide the same due process protections that would be available in a criminal contempt proceeding.").

The BAP has held that the bankruptcy court has the power to disbar or suspend an attorney under its inherent authority power. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (9th Cir.BAP1996). However, it is a question of first impression in this court whether the bankruptcy court has this power.

A. Characteristics of civil and punitive sanctions

"Civil penalties must either be compensatory or designed to coerce compliance." *Dyer*, 322 F.3d at 1192(citing *Hanshaw*, 244 F.3d at 1137-38). Although this court has never "develop[ed] . . . a precise definition of the term 'serious' punitive (criminal) sanctions," *id.* at 1193, it has stated that a penalty is criminal in nature "if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance, and the fine is not compensatory," *id.* at 1192(internal quotations omitted). It is also criminal if the sanction was intended "to vindicate the authority of the court." *Hanshaw*, 244 F.3d at 1138 (internal quotations omitted).

In the bankruptcy context, this court has found that a "sanctions award" between $50,000 and $200,000 that "was neither intended to coerce compliance nor intended to compensate . . . for actual damages" was a criminal contempt sanction. *Dyer*, 322 F.3d at 1192. Even "a flat unconditional fine totaling even as little as $50 could be criminal if the contemnor has no subsequent

opportunity to reduce or avoid the fine through compliance." *Id.* (internal quotation marks omitted).

B. Price's suspension

Price argues that his suspension was punitive in nature and therefore akin to criminal contempt. His suspension did not compensate debtor for losses sustained. *See id.* Nor was Price able to reduce or avoid the sanction through compliance. *See id.* Instead, it appears that the suspension's purpose was to punish Price for his "egregious" conduct.

In other contexts, however, this court has held that a lawyer disciplinary proceeding is not a criminal proceeding. Attorney suspension is "neither civil nor criminal, but an investigation in to the conduct of the lawyer-respondent." *Canatella v. California*, 404 F.3d 1106, 1110 (9th Cir.2005) (internal quotation marks omitted). "[D]isbarment proceedings are not for the purpose of punishment but to maintain the integrity of the courts and the profession." *Patterson v. Standing Comm. of Discipline to Bar of the U.S. Dist. Court of Or. (In re Patterson)*, 176 F.2d 966, 968 n. 1 (9th Cir.1949).

II. Due Process

A "lawyer subject to discipline is entitled to procedural due process, including notice and an

opportunity to be heard."[2] *Rosenthal v. Justices of the Supreme Court of Cal.*, 910 F.2d 561, 564 (9th Cir.1990) (citing *In re Ruffalo*, 390 U.S. 544, 550, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968)); *Crayton*, 192 B.R. at 978. A suspension hearing is not a criminal proceeding so the "normal protections afforded a criminal defendant do not apply." *Rosenthal*, 910 F.2d at 564; *see also Ex Parte Wall*, 107 U.S. 265, 288-89, 2 S.Ct. 569, 27 L.Ed. 552 (1883) (holding that no jury trial right attaches in an attorney disciplinary proceeding).

A. Notice

"Ordinarily a court proposing to impose sanctions notifies the person charged both of the particular alleged misconduct and of the particular disciplinary authority under which the court is planning to proceed." *DeVille*, 361 F.3d at 548. The rule, however, is not absolute. *Id.* This court has held that when using the inherent sanction power, due process is accorded as long as the sanctionee is "provided with sufficient, advance

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2. Under California law, an attorney facing disbarment or suspension is also entitled to present witnesses. *See Rosenthal*, 910 F.2d at 564. These protections go beyond what is required under federal constitutional law. *See id.; see also United States v. Engstrom*, 16 F.3d 1006, 1012 (9th Cir.1994) ("Procedural due process does not encompass the right to present all desired evidence."). Even if Price was entitled to call witnesses in this federal hearing, it appears he was able to do so. Although the only witnesses at the hearing were Price and debtor, Price submitted declarations from his other client and from Boisvert, the potential lender.

notice of exactly which conduct was alleged to be sanctionable, and [was] furthermore aware that [he] stood accused of having acted in bad faith." *Id.* at 549 (internal quotations omitted).

Price argues that "he did not receive such advance notice of the particular alleged misconduct or the disciplinary rule the court intended to base its sanctions upon." The record belies his argument.

1. Notice of Alleged Misconduct

With respect to the "particular alleged misconduct," the Second OSC identified four instances of alleged misconduct, stated that "the facts point to a clear conflict of interest," and specified the evidence required regarding the sanctionable conduct. Accordingly, Price was fully aware of the conduct charged against him.

Price argues that he had no notice of the possibility of sanctions for his failure to appear at the meeting of creditors. In the Second OSC, the bankruptcy court stated that it had issued the First OSC based upon Price's failure to appear at the meeting of creditors and the confirmation hearing. It then stated that the "non-appearance issue" had been resolved by Price's excuse and a $300 deduction from Price's $1,500 flat rate. Although the Second OSC indicated that the bankruptcy court would again investigate Price's failure to appear at the confirmation hearing, it did not do so with respect to Price's failure to appear at the meeting of creditors. The bankruptcy court did not clarify if this deduction

resolved both instances where Price failed to appear. Thus, Price argues that he could have reasonably relied upon the Second OSC indicating that it was no longer at issue. *See id.* at 550.

The BAP noted this but found that any error was harmless because the "other derelictions . . . support the sanction imposed." *Lehtinen*, 332 B.R. at 414. Although Price is entitled to a rebuttable presumption that the error was prejudicial, *see Obrey v. Johnson*, 400 F.3d 691, 699-701 (9th Cir.2005), based upon the record, it does appear that the bankruptcy court would have imposed the same sanctions even if it did not consider Price's failure to appear at the meeting of creditors. If anything, Price's other (mis)conduct, like the conflict of interest and the letter falsely stating that debtor's case had been dismissed, was far more egregious than his failure to appear at a § 341 meeting.

2. Notice of the Basis for Sanction Authority

Here, the bankruptcy court's Second OSC expressly stated that it was considering sanctions "pursuant to this court's inherent sanction powers (*In re DeVille*, 361 F.3d 539 (9th Cir.2004)) for bad faith conduct." The bankruptcy court also ordered Price to show cause "why he should not be suspended or disbarred from practice in this court." While it is true that the bankruptcy court's final order relied in part on specific provisions of the California Rules of Professional Conduct and California Business and Professions Code that it did not identify in the Second OSC, its invocation of its inherent

power is sufficient to satisfy due process concerns. *See DeVille*, 361 F.3d at 548-50(holding due process accorded even when the order to show cause stated Rule 9011 as basis for sanctions when attorney was ultimately sanctioned under inherent sanction authority because sanctionee was aware that he was accused of acting in bad faith). Furthermore, as just explained, the factual bases for the violations of the Rules and Codes were explicitly included in the Second OSC.

B. Bad faith/willful misconduct

Furthermore, the bankruptcy court made the findings of "bad faith" and "willful misconduct" required for the use of the inherent sanction power. *See Dyer*, 322 F.3d at 1196. Although the bankruptcy court did not explicitly state that Price's conduct was performed in "bad faith" or was "willful," it impliedly did so by finding that his "conduct in this case was outrageously improper, unprofessional and unethical under any reading of California's ethical standards for attorneys." *See Fink*, 239 F.3d at 994 ("[S]anctions are available if the court specifically finds bad faith *or conduct tantamount to bad faith.*" (emphasis added)); *Toombs v. Leone*, 777 F.2d 465, 471 (9th Cir.1985) (holding that explicit findings are not required where record supports a conclusion that the sanctioned attorney acted in bad faith).[3] Finally, the

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3. While *Dyer* notes that "[b]efore imposing sanctions under its inherent sanctioning authority, a court must make an *explicit* finding of bad faith or willful misconduct," 322 F.3d at

(Cont'd)

evidence adduced at the hearing (e.g., the five times Price solicited debtor to serve as a real estate broker for the sale of her house and the false letter), demonstrates "bad faith" and "willful misconduct."[4]

III. N.D. Cal. Civ. R. 11-6

Price argues that, pursuant to N.D. Cal. Civ. R. 11-6, the bankruptcycourt should have referred the suspension action to a standing committee.

"In the federal system there is no uniform procedure for disciplinary proceedings. The individual judicial districts are free to define the rules to be followed and the grounds for punishment." *Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1198 (9th Cir.1999) (internal quotations omitted). In the Northern District of California, the bankruptcy court is empowered to supervise and discipline attorneys pursuant to N.D. Cal.

(Cont'd)

1196 (emphasis added), the *Dyer* court cited *Fink* for this proposition, and as explained above, *Fink* permits the imposition of sanctions without an explicit finding, 239 F.3d at 994.

4. It is unclear "whether the bankruptcy court must find bad faith by clear and convincing evidence or under a preponderance of the evidence standard." *Dyer*, 322 F.3d at 1197 n. 20 (noting that this "question [has] not yet [been] resolved in this circuit"). We need not decide this question today because here there is clear and convincing evidence of "bad faith" in this case.

Bankr.R. 1001-2, which incorporates N.D. Cal. Civ. R. 11-1 through 11-9. N.D. Cal. Civ. R. 11-6(a) (2004), titled "Discipline," provides:

(a) General. In the event that a Judge has cause to believe that an attorney has engaged in unprofessional conduct, the Judge may do any or all of the following:

(1) Initiate proceedings for civil or criminal contempt under Title 18 of the United States Code and Rule 42 of the Federal Rules of Criminal Procedure;

(2) Impose other appropriate sanctions;

(3) Refer the matter to the appropriate disciplinary authority of the state or jurisdiction in which the attorney is licensed to practice;

(4) Refer the matter to the Court's Standing Committee on Professional Conduct; or

(5) Refer the matter to the Chief Judge for her or him to consider whether to issue an order to show cause under Civ. L.R. 11-7.

The bankruptcy court apparently imposed Price's suspension based on subsection (2), which authorizes "other appropriate sanctions." *See* N.D. Cal. Civ. R. 11-6(a)(2).

Although the BAP recommends that matters involving attorney discipline be referred to the standing

committee, *Crayton*, 192 B.R. at 978, Price's argument ignores the plain language of N.D. Cal. Civ. R. 11-6(a), which states that its procedures are discretionary. The Rule provides available measures the judge "may" take, not must take, if she has cause to believe an attorney has engaged in unprofessional conduct.

CONCLUSION

We conclude that because Price was accorded due process, the bankruptcy court possessed the inherent power to suspend him. The BAP's order is affirmed.

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT FILED OCTOBER 11, 2005

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

BAP No. NC-04-1534-BMAS.
Bankruptcy No. 03-46972.

In re Patricia Ann LEHTINEN,

Debtor.

Jim G. Price,

Appellant,

v.

Patricia Ann Lehtinen; Martha G. Bronitsky, Chapter 13 Standing Trustee; United States Trustee,

Appellees.

Argued and Submitted on June 24, 2005
at Sacramento, California.

Filed–Oct. 11, 2005.

Appendix B

Jim G. Price, Brentwood, CA, pro se.

Patricia Ann Lehtinen, Pittsburg, CA, pro se.

Kurt Janike, Martha G. Bronitsky, Hayward, CA, Chapter 13 Trustee.

Minnie Loo, Oakland, CA, U.S. Trustee.

Before: BRANDT, MARLAR, and SMITH, Bankruptcy Judges.

OPINION

BRANDT, Bankruptcy Judge.

Jim Price, debtor's counsel, appeals the order suspending him from practicing for three months in the bankruptcy court for the Northern District of California for sending, without his client's consent, substitute counsel to her § 341[1] meeting, his non-appearance at her chapter 13 plan confirmation hearing (after which he misinformed her that her case had been dismissed),

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1. Absent contrary indication, all section and chapter references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330. "Rule" references are to the Federal Rules of Bankruptcy Procedure, and "FRCP" references are to the Federal Rules of Civil Procedure. "RPC" references are to the California Rules of Professional Conduct; "BLR" references are to the Bankruptcy Local Rules for the Northern District of California, and "CLR" references are to the Civil Local Rules for the Northern District of California.

and for soliciting her to use his services as a real estate broker to sell her home.

We conclude that sanctions were warranted and that Price received due process, but the bankruptcy court erred in not considering the American Bar Association ("ABA") Standards in determining the appropriate sanctions, required by *In re Crayton*, 192 B.R. 970, 980 (9th Cir. BAP 1996). Accordingly, we VACATE IN PART and REMAND.

I. FACTS

In August 2003, after her lender recorded a notice of default, debtor Patricia Lehtinen consulted with appellant Jim Price, an attorney and licensed California real estate broker. Price and debtor discussed her options, including her filing a bankruptcy petition and selling her home. Price indicated that he could represent her both as counsel in her bankruptcy case and as broker in listing her house for sale, but did not disclose the potential conflict of interest inherent in such dual representation.

Near the end of October, debtor contacted Price to tell him she intended to file bankruptcy and also that she wanted to borrow money to fix her house before selling it. Price agreed to represent her and filed her chapter 13 petition on 2 December 2003 on the eve of a scheduled foreclosure, and later filed a plan.

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On 19 February 2004 debtor attended the § 341 first meeting of creditors. Without informing debtor, Price sent attorney Cal Zamanski, who is not an employee of his law firm, in his stead. At the § 341 meeting, the chapter 13 trustee objected to debtor's plan, which provided for a 10% payout to unsecured creditors. Zamanski informed debtor that because of the substantial equity in her house, her plan would not be confirmed without an amendment to pay 100% to her creditors. Price sent debtor an amended plan for signature, which she never signed.

The trustee served a notice of the 3 June 2004 confirmation hearing on Price and the debtor. Meanwhile, Price had contacted Rene Boisvert of Boulevard Equity Group about obtaining a loan for debtor to fix up her house. Boisvert told debtor that Boulevard would lend her the funds, pay off the first deed of trust held by Washington Mutual, and that Boulevard would be repaid from the proceeds of sale. As a condition of the loan, debtor had to retain Price as broker for the sale, because Boisvert wanted a "professional" involved. At some point debtor became uncomfortable with these terms, and never completed the loan documents.

In April 2004 debtor again met with Price, as she was concerned about her home being sold at a foreclosure sale without her knowledge. Price contacted the trustee and Washington Mutual and learned that the house had not yet been foreclosed, but that debtor was delinquent post-petition on her mortgage and plan

payments. He advised debtor that her case could be dismissed, told her to contact the trustee to get caught up on plan payments, and to list the home to obtain a quick sale.

Price indicated to debtor his opinion that her home was worth $340,000-$345,000. Debtor, who apparently has a background as a realtor, disagreed, based on her knowledge of comparable sales in the area and the condition of her home. She believed that the house could be sold for around $400,000. Transcript, 26 July 2004, at 22:17-18 and 34:6-7.

Around this time Price inquired of the United States Trustee ("UST") about serving as a real estate broker in a case in which he was also debtor's counsel. The UST's office advised that it would object to Price's appointment as a broker because he would fail the disinterestedness requirement of § 327.

Debtor testified she called the trustee's office in late April, and was advised that she had until the confirmation hearing either to sell or refinance her home, or amend her plan, and that she was required to attend the hearing. Debtor testified that this was the first time she heard of the confirmation hearing. Debtor called Price and told him she wanted to sell her home. She did not inform Price that she had already listed her home with a family friend and accepted an offer on 20 May 2004 for $390,000; the transaction closed 23 July 2004. Findings of Fact, Opinion, and Conclusions of Law ("Opinion"), at 5 and 7.

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Price did not appear at the confirmation hearing. At the request of another client, he had agreed to appear at 1:00 p.m. that afternoon in Alameda County Superior Court, although he knew it conflicted with the 2:00 p.m. confirmation hearing. He did not request a continuance of either hearing. Debtor went to the confirmation hearing alone, and informed the court of the pending sale. The court confirmed the plan with a 100% payout to unsecured creditors, conditioned upon close of escrow within 60 days. Opinion, at 6.

Without verifying the outcome of the confirmation hearing, Price wrote debtor a letter the next day stating that her case had been dismissed and that Washington Mutual could proceed with the foreclosure sale on 10 June 2004. He proposed refiling another case or listing the home for sale. When debtor later asked Price to explain why he had written the letter, he responded that he was trying to get her to stop procrastinating and "do something." She then informed Price of the pending sale and the plan confirmation. Opinion, at 6.

At the confirmation hearing, the bankruptcy court issued an order to show cause ("First OSC") why Price should not have to disgorge compensation received from the debtor for his failure to appear at both the § 341 meeting and confirmation hearing. At the 8 July hearing on the First OSC, the court ordered Price to disgorge $300 of the $1500 fee he charged debtor. Opinion, at 7.

Later the same day, debtor filed a letter alleging that Price had "blatantly lied" to her about the dismissal

of her case, had asked her to pay him to file another bankruptcy, and retain him to list her house. Her letter reported that Price "continually tried to secure my home as a listing under his real estate company," and that when she went to obtain a loan from Price's "friend," the loan was conditioned upon her using Price as listing broker. Although Price had suggested she list her home at $340,000 for a "quick sale," she sold the home without any repairs for $390,000 after listing it for only one and a half weeks. Debtor concluded: "I really feel Mr. Price is an unethical attorney/realtor with grave conflicts of interest issues."

On 13 July the court issued another order, attaching debtor's letter and requiring Price to "show cause why he should not be sanctioned pursuant to the court's inherent sanction powers . . . for bad faith conduct [and/or] suspended or disbarred." ("Second OSC"). At the hearing on the Second OSC, at which both Price and the debtor testified, the court found:

1. Price violated California Rules of Professional Conduct 3-500,[2] and California Business and Professions Code § 6068(m),[3] when he failed to disclose to the Debtor

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2. California RPC 3-500 provides: "A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed."

3. That section provides:

> It is the duty of an attorney to do all of the following:
>
> (Cont'd)

that Zamanski would appear and represent her at the Meeting of Creditors, and when he failed to obtain the Debtor's consent to Zamanski's representation of her at the Meeting of Creditors.

2. Price violated California Rule of Professional Conduct 3-500, and California Business and Professions Code § 6068(m), when he failed to inform the Debtor of the Confirmation Hearing.

3. Price violated California Rule of Professional Conduct 3-110(A),[4] when he intentionally failed to appear and represent the Debtor at the Meeting of Creditors and the Confirmation Hearing.

4. Price violated the basic duties an attorney owes to a client to represent the Debtor with undivided loyalty, to exercise independent judgment on the Debtor's behalf, and to act in the Debtor's best interests.

(Cont'd)

. . . .

> (m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

4. RPC 3-110(A) provides: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

Opinion, at 15-16. The court ordered Price to disgorge the balance of the fees debtor had paid him, suspended him from the practice of law in the U.S. Bankruptcy Court for the Northern District of California for three months, beginning 22 October 2004, and directed that a copy of its Opinion be forwarded to the California State Bar.

Price timely appealed, and we granted his motion for stay pending appeal of the suspension provision. At oral argument Price indicated that he does not dispute the disgorgement sanction.

No appellees briefed or argued this appeal. We invited amicus briefs, and one was filed by David A. Smyth, appellant in an appeal to us concerning similar issues. *In re Brooks-Hamilton*, 329 B.R. 270 (9th Cir. BAP 2005).

II. JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and § 157(b)(1) and (b)(2)(A), and we do under 28 U.S.C. § 158(c).

We note parenthetically that Price does not challenge, on appeal, the bankruptcy court's power to enter a final judgment under 28 U.S.C. § 157, nor, so far as we can tell, did he in the bankruptcy court. Accordingly, he has waived any issue respecting the core or non-core nature of the disciplinary proceeding: "[A]n appellate court will not consider issues not properly

raised before the [trial] court. Furthermore, on appeal, arguments not raised by a party in its opening brief are deemed waived." *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir.1999). *See also In re Sedona Inst.*, 220 B.R. 74, 76 (9th Cir. BAP 1998), *In re Jodoin*, 209 B.R. 132, 143 (9th Cir. BAP 1997), and *Laboa v. Calderon*, 224 F.3d 972, 980 n. 6 (9th Cir.2000).

In any event, as the acts or actions on which Price's suspension was predicated took place in the course of his representation of debtor in matters central to the administration of her case, the disciplinary proceeding fits comfortably within the ambit of a core proceeding, 28 U.S.C. § 157(b)(2)(A), for the reasons ably and persuasively articulated in Part III of the dissent in *In re Sheridan*, 362 F.3d 96, 121-126 (1st Cir.2004) (Lynch, J., dissenting). The majority in *Sheridan*, ruling on the core/non-core question, held that an omnibus disciplinary proceeding (i.e., not arising out of a single case) is a non-core matter, and that the disciplined attorney's consent to entry of a final judgment by the bankruptcy court could not be presumed.

Because Price failed to raise the core/non-core and consent issues in the bankruptcy court, and has waived them on appeal, we need not and do not reach these questions.

III. ISSUE

Whether the bankruptcy court abused its discretion in ordering a sanction of suspension.

IV. STANDARDS OF REVIEW

We review an award of sanctions and the terms of a disciplinary order for abuse of discretion. *In re DeVille*, 280 B.R. 483, 492 (9th Cir. BAP 2002), *aff'd*, 361 F.3d 539 (9th Cir.2004) (citing *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 283 (9th Cir.1996)); *Crayton*, 192 B.R. at 975.

A trial court's interpretation and application of a local rule is reviewed for abuse of discretion. *Id.*; *In re Mendez*, 231 B.R. 86, 88 (9th Cir. BAP 1999), *aff'd*, 230 F.3d 1367 (9th Cir.2000) (table).

A bankruptcy court necessarily abuses its discretion if it bases its decision on an erroneous view of the law or clearly erroneous factual findings. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). Under the abuse of discretion standard, we "must have a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached before reversal is proper." *In re Black*, 222 B.R. 896, 899 (9th Cir. BAP 1998) (citations and quotation marks omitted).

We review findings of fact for clear error. Rule 8013. A factual finding is clearly erroneous if the appellate

court, after reviewing the entire record, has a firm and definite conviction that a mistake has been committed. *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). If two views of the evidence are possible, the trial judge's choice between them cannot be clearly erroneous. *Id.* at 574, 105 S.Ct. 1504. Findings of fact based upon credibility are given particular deference by appellate courts. *Id.* at 575, 105 S.Ct. 1504. *See also In re Padilla,* 213 B.R. 349, 352 (9th Cir. BAP 1997). A court may disbar or suspend an attorney only upon clear and convincing evidence. *Crayton,* 192 B.R. at 975.

Finally, due process is a question of law which we review de novo, *DeVille,* 280 B.R. at 492.

V. DISCUSSION

At the outset, Price challenges the bankruptcy court's authority to discipline attorneys. Our review of a disciplinary order also focuses on whether the procedure followed by the bankruptcy court afforded appellant sufficient due process, whether the evidence supports the findings, and whether the penalty imposed was reasonable. *Crayton,* 192 B.R. at 978.

We conclude that the bankruptcy court could discipline Price and afforded him due process. He has not shown that the bankruptcy court clearly erred in its factual findings, nor that it lacked clear and convincing evidence. Thus discipline was appropriate,

but the bankruptcy court did not consider the ABA Standards in determining the appropriate sanction. We vacate and remand for that purpose.

A. *Bankruptcy Court Authority*

The bankruptcy court possesses the inherent authority "to impose sanctions for a pattern of bad faith conduct that transcends conduct addressed by particular rules or statutes." *DeVille,* 280 B.R. at 494 (citing § 105(a)); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 51, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); and *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 283-84 (9th Cir.1996). Congress implicitly recognized this inherent power in enacting § 105(a):

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

See Rainbow Magazine, 77 F.3d at 284; *see also In re Dyer,* 322 F.3d 1178, 1189-90 (9th Cir.2003) (discussing contempt authority).

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Section 105 empowers bankruptcy courts to impose civil but not criminal or punitive sanctions. *Dyer*, 322 F.3d at 1197. In *Dyer*, the Ninth Circuit considered the propriety of monetary sanctions imposed against a creditor for violations of the automatic stay. In addition to ordering the creditor to pay the trustee's fees and costs, the bankruptcy court imposed a sanction of $50,000. The Circuit held that this was a punitive sanction not authorized under the bankruptcy court's contempt authority or its inherent authority, and noted that a civil penalty is either compensatory or is designed to coerce compliance. To the extent that a penalty does not so operate, it is a criminal penalty or sanction. *Dyer*, 322 F.3d at 1192. The Circuit concluded that "[t]he bankruptcy court's inherent sanction authority . . . , like its civil contempt authority, does not authorize significant punitive damages, so the punitive sanctions cannot stand, whatever [creditor's] degree of culpability." *Id.* at 1197.

We have observed that the bankruptcy court's inherent authority includes the power to suspend or disbar attorneys who appear before it. *Crayton*, 192 B.R. at 976. At first glance, *Dyer* appears to cast doubt on that proposition. *Dyer* clarifies that neither contempt nor inherent authority authorizes the bankruptcy court to impose punitive or criminal sanctions. The *Dyer* court was concerned with the lack of due process protections that a criminal defendant is ordinarily entitled to, such as the right to a jury trial. *Dyer*, 322 F.3d at 1197. It noted that "the bankruptcy court is unable to preside over a jury trial absent explicit consent from the parties

and the district court[,]" and that "allowing a non Article III court to adjudicate criminal contempt raises fundamental constitutional questions." *Id.* at 1194 (citations omitted).

As attorney suspension and disbarment are neither compensatory nor designed to coerce compliance, they are arguably criminal sanctions, but "[a] lawyer disciplinary proceeding is not a criminal proceeding." *Rosenthal v. Justices of the Supreme Court of California*, 910 F.2d 561, 564 (9th Cir.1990). It is "neither civil nor criminal, but an investigation into the conduct of the lawyer-respondent." *Canatella v. California*, 404 F.3d 1106, 1110 (9th Cir.2005) (citation and quotation marks omitted). *See also In re Echeles*, 430 F.2d 347, 349 (7th Cir.1970) (disbarment and suspension proceedings are special proceedings resulting from the court's inherent power over their officers).

Accordingly, the "normal protections afforded a criminal defendant do not apply." *Rosenthal*, 910 F.2d at 564. An attorney subject to disciplinary action is not entitled to the presumption of innocence, the "beyond a reasonable doubt" burden of proof, confrontation of witnesses, *id.* at 564-65, or a jury trial. *See also, In re Smith*, 123 F.Supp.2d 351, 354 (N.D.Tex.2000), *aff'd*, 275 F.3d 42 (5th Cir.2001) (table) (attorney subject to disciplinary proceedings not entitled to jury trial or full evidentiary hearing under the Sixth Amendment). *Dyer* therefore does not require us to hold that a bankruptcy court lacks authority to suspend or disbar the attorneys who appear before it.

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B. *Disciplinary Procedure*

We have observed that "[t]here is no uniform procedure for disciplinary proceedings in the federal system. Instead, the individual judicial districts are free to define the rules to be followed and the grounds for punishment." *Crayton,* 192 B.R. at 976 n. 7 (citation omitted).

In the Northern District of California, the bankruptcy court is empowered to supervise and discipline attorneys via BLR 1001-2, which incorporates CLR 11-1 through 11-9, relating to attorneys appearing in that district. CLR 11-6, entitled "Discipline," provides:

> (a) General. In the event that a Judge has cause to believe that an attorney has engaged in unprofessional conduct, the Judge may do *any or all* of the following:
>
> (1) Initiate proceedings for civil or criminal contempt under Title 18 of the United States Code and Rule 42 of the Federal Rules of Criminal Procedure;
>
> (2) Impose other appropriate sanctions;
>
> (3) Refer the matter to the appropriate disciplinary authority of the state or jurisdiction in which the attorney is licensed to practice;

> (4) Refer the matter to the Court's Standing Committee on Professional Conduct; or
>
> (5) Refer the matter to the Chief Judge for her or him to consider whether to issue an order to show cause under Civ. L.R. 11-7.

(emphasis added).

The bankruptcy court apparently imposed the suspension here at issue based on subsection (2), which authorizes "other appropriate sanctions."

We have recommended that matters involving attorney discipline be referred to the Standing Committee. *Crayton*, 192 B.R. at 978. The rationale for this recommendation is that it "relieves a court from serving in the dual roles of prosecutor and arbiter in the investigation, prosecution and discipline of attorneys." *Id.* The authorities do not require such a referral. *Brooks-Hamilton*, 329 B.R. at 286. There, in a case arising from the same district as this one, we upheld a six-month suspension from practice for repeated Rule 9011 violations, as well as a compensatory monetary sanction. The suspended attorney's arguments there were procedural: no referral to standing committee, no finding of bad faith, and consideration of his prior failures in other cases, rather than lack of bankruptcy jurisdiction to suspend. He did cite *Dyer*, but for the proposition that a finding of bad faith is required. We ruled to the contrary.

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CLR 11-6 authorizes the court to take "any or all" of the listed actions. Subsection 2 authorizes the court to impose "other appropriate sanctions." Under subsection 3, the court may refer the matter to the state bar (an "appropriate disciplinary authority"), and under subsection 4 it may refer the matter to the Standing Committee.

Contrary to Price's assertions, the bankruptcy court had authority to impose its own sanctions in addition to referring the matter to the State Bar of California (more precisely, the court forwarded a copy of the Opinion "for its review and consideration"). Opinion, at 16. Nor did the court err in not referring the matter to the Standing Committee.

C. *Due Process*

Price argues that he did not receive adequate notice of the particular alleged misconduct or the disciplinary rule upon which the court intended to base sanctions.

Due process is, of course, required. An attorney subject to discipline is entitled to notice of the precise nature of the charges leveled against him and an opportunity to be heard. *Crayton,* 192 B.R. at 978 (citing *In re Ruffalo,* 390 U.S. 544, 550 and 552, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968)). As the Ninth Circuit noted in affirming our opinion in *DeVille,* "Ordinarily a court proposing to impose sanctions notifies the person charged both of the particular alleged misconduct and of the particular disciplinary authority under which the court is planning to proceed." 361 F.3d at 548.

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The Second OSC identifies four instances of alleged misconduct: (1) Price's failure to inform debtor of her confirmation hearing; (2) his pressuring of the debtor to list her house for sale with his brokerage firm; (3) the lender's (Boisvert's) condition of retaining Price as the broker for the loan transaction; and (4) his letter to the debtor erroneously informing her that her bankruptcy case had been dismissed and that a foreclosure sale was imminent. The OSC further states that "the facts point to a clear conflict of interest between Mr. Price acting as the debtor's lawyer, soliciting the debtor to use his services as a real estate broker, and serving as a loan broker." It cites to Cal. Eth. Op.1982-69, 1982 WL 31793 (Cal. St. Bar Comm. Prof. Resp.1982), which states that while an attorney may ethically act as both attorney and real estate broker in the same transaction, such dual representation presents substantial risks. The attorney must conform to the standards of both professions; in the case of conflict, the State Bar of California standards control.

Although the Second OSC did not cite to the provisions it ultimately relied upon, it notified Price that the court was considering sanctions, including suspension or disbarment, and specified the sanctionable conduct and the evidence required. In short, it adequately informed him of the offending conduct and charges so that he could prepare an adequate defense.

Price also had the opportunity to present evidence on the issue of his failure to inform debtor of the substitution of counsel for the § 341 meeting, and did

so. As the other derelictions found by the bankruptcy court support the sanction imposed, any error in not mentioning that conduct in the Second OSC was harmless. 28 U.S.C. § 2111; *In re Maximus Computers, Inc.*, 278 B.R. 189, 194 (9th Cir.BAP2002).

The bankruptcy court afforded Price due process.

D. *Evidence*

1. *Adequacy?:*

The bankruptcy court found:

a. Zamanski's involvement as an appearance attorney at debtor's 341 meeting was a significant development. Price was required to disclose and obtain debtor's consent to Zamanski's involvement, but failed to do so. Opinion at 9-10.

b. Price failed to inform the debtor that she was required to attend the confirmation hearing. *Id.* at 10-11.

c. Price intentionally failed to appear at the confirmation hearing. *Id.* at 12-13.

d. Price's numerous solicitations to serve as the debtor's real estate broker, his cavalier valuation of her home, and his failure to focus solely on the debtor in her case conflicted with his duties to act with undivided loyalty and exercise independent judgment on behalf of

debtor's best interests. His conduct was outrageously improper, unprofessional and unethical. *Id.* at 14-15.

In addition, the bankruptcy court found much of Price's testimony not credible. *Id.* at 10, 12.

Price argues that the bankruptcy court erred in imposing sanctions without first making a finding of bad faith by clear and convincing evidence, citing *Crayton*, 192 B.R. at 975. *Crayton* does not support the proposition that a bad faith finding is required for suspension. While acknowledging that a bad faith finding is generally required before a court may impose sanctions under its inherent powers, we concluded that a bad faith requirement does not necessarily extend to "every possible disciplinary exercise of the court's inherent power, especially where it is exercised to protect the public against unqualified practitioners." *Id.* at 977. In the Ninth Circuit, a court may also sanction upon a finding of willfulness, recklessness, or other fault by the offending party, and if a bad faith finding is required, an implicit finding will suffice. *See id.* (citing *Unigard Sec. Ins. v. Lakewood Eng'g & Mfg.*, 982 F.2d 363, 368 n. 2 (9th Cir.1992); *Hedges v. Resolution Trust Corp.*, 32 F.3d 1360, 1363 (9th Cir.1994); and *Toombs v. Leone*, 777 F.2d 465, 471 (9th Cir.1985)). The bankruptcy court's findings suffice under these standards.

Next, Price argues the bankruptcy court clearly erred in finding "[t]hereafter, the Court issued an order for Price to appear on July 26th and show cause why he should not be sanctioned and/or suspended or disbarred

from practice before this Court for the conduct described in the Debtor's July 8, 2004 letter." Price contends that the Second OSC "simply ordered appellant to appear and show cause why he should not be sanctioned for bad faith conduct. It did not refer to debtor's letter." This is simply incorrect: the Second OSC, attached to which is a copy of debtor's 8 July letter, states, "[T]he court received a facsimile from the debtor (attached Exhibit A) which raises serious ethical issues regarding Mr. Price's conduct in this case." Second OSC, page 2, lines 5-6.

2. *Clear and convincing?*

Price also argues that the evidence was not clear and convincing, and thus that the bankruptcy court clearly erred in finding that he:

a. "did not obtain the Debtor's consent for Zamanski to represent her at the Meeting of Creditors." Opinion at 3.

b. "went to view the Debtor's house and valued it at $340,000 to $345,000 for a quick sale. . . . No evidence was presented of any additional efforts by Price to determine the value of the house." *Id.* at 4.

c. "then told the Debtor that she needed to file an amended plan or fix the house and sell it, and encouraged her to list the house at $340,000 'as is' for a quick sale." *Id.*

d. "responded that he was trying to get her to stop procrastinating and do something." *Id.* at 7.

To review a factual finding for clear error, we must have before us the entire transcript and all other relevant evidence considered by the bankruptcy court. *In re Massoud,* 248 B.R. 160, 163 (9th Cir. BAP 2000). So, too, to review for compliance with the higher "clear and convincing" standard. Price provided neither a complete transcript of the evidentiary hearing nor, most importantly, the portion of the transcript containing the bankruptcy judge's examination of the debtor, which was most likely to support the disputed findings. Further, we are to give particular deference to the bankruptcy court's findings of fact that are based upon credibility. *Anderson,* 470 U.S. at 575, 105 S.Ct. 1504.

It is Price's burden to show clear error, and his responsibility to provide an adequate record. *Massoud,* 248 B.R. at 163. As he chose not to include the complete transcript, we are entitled to presume that the missing portions are not helpful to his position. *In re Gionis,* 170 B.R. 675, 680-81 (9th Cir. BAP 1994), *aff'd,* 92 F.3d 1192 (9th Cir.1996). And we may affirm the bankruptcy court's factual findings where the record is inadequate to show clear error. *In re Friedman,* 126 B.R. 63, 68 (9th Cir. BAP 1991). Likewise, when, as here, the record is insufficient to show the lack of clear and convincing evidence.

Appendix B

E. *Reasonableness of Sanctions*

The bankruptcy court did not abuse its discretion in deciding to impose sanctions; the remaining question is whether those sanctions were reasonable.

In *Crayton*, we adopted the ABA Standards:

> The ABA Standards set forth a model which can be used to categorize misconduct and to identify the appropriate sanction. They promote the thorough, rational consideration of relevant factors, and help to achieve consistency when imposing attorney discipline. We consider these factors as appropriate in determining a reasonable disciplinary sanction. *The failure to consider such factors constitutes an abuse of discretion.*

Crayton, 192 B.R. at 980 (emphasis added, citation omitted). We also recommended use of state bar standards and relevant case law as supplemental points of reference. *Id.*

The factors to be considered in determining an appropriate sanction are:

1. Whether the duty violated was to a client, the public, the legal system, or the profession;

2. Whether the lawyer acted intentionally, knowingly, or negligently;

3. Whether the lawyer's misconduct caused a serious or potentially serious injury; and

4. Whether there are aggravating and/or mitigating factors.

Id.

Aggravating factors include considerations which justify an increase in the degree of discipline imposed, such as a dishonest or selfish motive, refusal to acknowledge wrongful nature of conduct, and the vulnerability of the victim. *Id.* at 981 (citing ABA Standards 9.21 and 9.22). Mitigating factors, for example, the absence of a prior disciplinary record and imposition of other sanctions, may justify a reduction in the degree of discipline. *Id.* (citing ABA Standard 9.31 and 9.32).

Price contends that the bankruptcy court did not weigh the appropriate factors. While the court made numerous findings and conclusions, and may have considered the relevant factors, the Opinion does not clearly reflect that consideration. It discusses the first two categories of ABA factors, and arguably the third, but does not reference possible aggravating or mitigating factors. This was technically an abuse of discretion. *Crayton*, 192 B.R. at 980. Given the severity of suspension, we will vacate the suspension and remand to the bankruptcy court for that consideration.

We note that ABA Standard 4.32 provides, "Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client." Although Price argues that the duty of disclosure never arose because debtor never retained his services as a broker, we see no reason why his soliciting debtor for that purpose would not be sufficient to trigger the disclosure requirement, because it would have been material to her decision of whether to use his broker services.

VI. CONCLUSION

The bankruptcy court was within its authority in sanctioning Price, and afforded him due process. Price has neither shown that the bankruptcy court clearly erred in its factual findings nor that it lacked clear and convincing evidence. But the record does not disclose that the court considered all appropriate factors in determining what sanction to impose. Accordingly, we VACATE the portion of the bankruptcy court's order suspending appellant and REMAND for further proceedings.

APPENDIX C — FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED OCTOBER 22, 2004

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 03-46972 RN13
Chapter 13

In re Patricia Ann Lehtinen,

Debtor.

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW

On July 8, 2004, this Court received a letter from the debtor in this case, Patricia Arm Lehtinen, (herein the "Debtor") raising ethical questions as to the conduct of her attorney, Jim G. Price (herein "Price"), in handling her bankruptcy case. Thereafter, the Court issued an order for Price to appear at to hearing on July 26, 2004 (herein the "July 26th Hearing") and show cause why he should not be sanctioned and/or suspended or disbarred from practice before this Court for the conduct described in that letter (*Order to Show Cause*, Doc. 19; Court Ex. A, letter dated July 8, 2004, attached). In accordance with Federal Rule of Civil Procedure 52, as incorporated by Federal Rule of Bankruptcy

Procedure 7052,[1] and upon consideration of the testimony, evidence, supplemental documents and pleadings submitted to the Court at and after the July 26th Hearing and the record in this case, the Court hereby submits the following findings of fact, opinion and conclusions of law.

FINDINGS OF FACT

1. The Debtor suffers from post-traumatic stress disorder, attention deficit hyperactivity disorder, and fibromyalgia. In August of 2003 she was in distress due to the recent death of her mother and of her son. At that time the Debtor had been unemployed for about 7 years and was receiving $754 in monthly disability payments. The Debtor supplemented her income by rending rooms in her house to tenants. During the preceding two years, several of these tenants failed to pay rent regularly to the Debtor, and by August, 2003 she had fallen behind on her mortgage payments.

2. Price is a member of the State Bar of California and a licensed California real estate broker. (Court Ex. B, License Information from California Dept. of Real Estate Records, of which this Court takes judicial notice, attached). Price operates his law practice and real estate brokerage from the same office, located in Brentwood, California. On or about August 23, 2003, the Debtor met

1. Unless otherwise indicated, all section and rule references are to the Bankruptcy Code, 11 U.S.C. sections 101-1330 and the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

with Price at his office to discuss saving her house from foreclosure.

3. At this meeting the Debtor told Price that her mortgage lender, Washington Mutual, had recorded a notice of default on her house, but that a trustee's foreclosure sale date had not been published. Price and the Debtor discussed her getting caught up on the delinquent mortgage payments. Price told the Debtor he could represent her in filing a bankruptcy case and in listing her house for sale. At this time, the Debtor did not feel pressured or uncomfortable that Price had offered his services as both a bankruptcy attorney and a real estate broker. Price did not at any time disclose to the Debtor the potential conflict of interest of him acting in the dual capacity as her bankruptcy attorney and real estate broker. Upon the conclusion of this meeting the Debtor, a self-described procrastinator due to her medical conditions, was undecided as to what to do.

4. By the end of October, 2003, the Debtor had decided to file for bankruptcy and again contacted Price. She also told Price that she wanted to secure a loan so she could fix up her house and sell it for as much as possible, "if God and the bankruptcy court will give me time to accomplish this." (Price Ex. 1, fax dated Oct. 28, 2003, attached). On or about November 19, 2003, Price and the Debtor signed the *Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys* (Doc. 10), pursuant to which Price agreed to represent the Debtor in her bankruptcy case, which included attending the

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Meeting of Creditors required by §341 of the Bankruptcy Code (herein the "Meeting of Creditors").

5. On December 2, 2003, the Debtor filed a Chapter 13 petition (Doc. 1). A trustee's foreclosure sale on her house had been noticed for shortly after December 2, 2003. On December 22, 2003, Price and the Debtor completed and filed her bankruptcy schedules, statement of financial affairs and proposed Chapter 13 plan (Docs. 8 and 9). The Debtor's proposed plan called for an estimated 10% payment of allowed unsecured claims. The Debtor was to make a monthly plan payment of $560 for 60 months to the Chapter 13 Trustee, along with her regular $1,610 monthly mortgage payment for Washington Mutual.

6. On February 19, 2004, the Debtor attended the Meeting of Creditors, but Price did not. Instead, at the request of Price, attorney Cal Zamanski ("Zamanski") specially appeared to represent the Debtor. Zamanski is not an associate or member of, or otherwise employed by, Price's law firm. Price did not tell the Debtor that he would not appear, or that Zamanski would appear, and Price did not obtain the Debtor's consent for Zamanski to represent her at the Meeting of Creditors.

7. At the Meeting of Creditors, Zamanski informed the Debtor that because of the equity in her house, the Chapter 13 Trustee would only approve a plan that paid 100% of allowed unsecured claims, as well as payment of her delinquent mortgage payments. The Meeting of Creditors was continued to March 18, 2004, and the

Debtor was directed to file an amended plan (Docket entry dated 2/23/04).

8. Thereafter, Price sent the Debtor a letter, requesting that she sign off on an amended plan providing 100% payment of allowed unsecured claims and for the payment of the delinquent mortgage payments. The Debtor did not understand the new payment amounts and did not sign off on the proposed amended plan.

9. On March 19, 2004, the Chapter 13 Trustee filed and served a *Notice of Confirmation Hearing*. The notice stated that the confirmation hearing was scheduled for June 3, 2004 at 2:00 p.m., but did not indicate that the debtor's attendance was required. According to the certificate of service, the Chapter 13 Trustee mailed a copy of the *Notice of Confirmation Hearing* to the Debtor and Price. (*Notice of Confirmation Hearing*, Doc. 14).

10. In March of 2004, Price contacted Rene Boisvert ("Boisvert") from the Boulevard Equity Group ("Boulevard") to inquire about Boulevard loaning the Debtor funds to fix up her house prior to listing it for sale. (*Boisvert Declaration* at ¶4, attached as Ex. B to Price Ex. 2, *Response to Order to Show Cause*, Doc, 22). Price telephoned Boisvert in response to a mailing received from Boisvert soliciting business from bankruptcy attorneys. Prior to receiving this telephone call, Boisvert stated that he did not know and had never spoken to Price. (*Id*, at ¶ 3). At some point after this

telephone call, Boisvert spoke to the Debtor, proposing to loan her the money to fix up her house and payoff Washington Mutual with Boulevard to be repaid from the proceeds from the sale of the house. Boisvert conditioned the Debtor receiving the loan on her retaining Price as her real estate broker. Boisvert declares that he insisted on this condition because, given the Debtor's previous loan performance problems, he wanted "a professional involved to increase the probability of the plan being completed." (*Id.* at ¶6).

11. At some point, Price went to view the Debtor's house and valued it at $340,000 to $345,000 for a quick sale. The Debtor thought this price range was too low, and told Price that rental houses in the neighborhood sold for $360,000 to $365,000, The Debtor thought her house should sell for about $400,000. No evidence was presented of any additional efforts by Price to determine the value of the house.

12. In April, 2004, the Debtor became frightened by television commercials about financially troubled homeowners avoiding eviction and property foreclosure. On April 23, 2004, the Debtor again met with Price. Concerned that the Debtor's house may have already been sold through foreclosure, Price called the Chapter 13 Trustee and Washington Mutual and learned that it had not been sold. From those conversations, Price learned that the Debtor was delinquent post-petition on her mortgage loan and Chapter 13 plan payments. Price told the Debtor that due to these payment delinquencies, her case was in jeopardy of being

dismissed. Price then told the Debtor that she needed to file an amended plan or fix the house and sell it, and encouraged her to list the house at $340,000 "as is" for a quick sale. The Debtor thought that $340,000 was too low. Price advised the Debtor to contact the Chapter 13 Trustee and to get caught up on her missed plan payments.

13. The Debtor soon thereafter telephoned the Chapter 13 Trustee, who told her that she had until her Confirmation Hearing to do something with the house or her plan, and that she was required to attend the Confirmation Hearing. The Debtor testified that this late April, 2004 telephone conversation was the first time she learned of the Confirmation Hearing and that she was required to attend. After speaking with the Chapter 13 Trustee, and upon receipt of an April 27, 2004 letter from Price (herein the "April 27th Letter) recounting their April 23rd meeting, (Price Ex. 3, attached), the Debtor called Price and told him that she wanted to sell the house and that the Trustee said she had until June to do so, During this conversation, the Debtor did not tell Price that the Chapter 13 Trustee advised her to appear at the Confirmations Hearing.

14. By this time the Debtor had received a loan packet from Boisvert, which again conditioned the issuance of a loan on her retaining Price as her real estate broker. The Debtor, who formerly worked in the real estate business, felt she should be able to use a broker of her choice. The Debtor became uneasy and angry about the loan condition, and thought it was strange.

The Debtor began to wonder if Price and Boisvert were working together to get her house sold quickly to a straw purchaser for an artificially low price, who would then resell it for a higher price and split the realized equity with Price and Boisvert. At about this time, the Debtor lost trust in Price. She did not return the loan package to Boisvert. Later, the Debtor received a second loan package from Boisvert but did not return that one, either.

15. Instead, the Debtor listed the house through a family friend in the real estate business rather than fixing up her house prior to listing it for sale, she testified she just "cleaned it up the best as I could." About a week and a half afterward, on or about May 20, 2004, the Debtor accepted an offer on her house, as is, for $390,000, She did not inform Price that she had listed and accepted an offer on her house.

16. Price testified at the July 26 Hearing that toward the end of May 2004, "he anticipated he might be hired as a broker," so he contacted the United States Trustee (the "UST") to hypothetically inquire about serving as a real estate broker in the case while also representing the debtor as her attorney. The UST told Price his existing representation of a debtor in a bankruptcy case would be a problem to his appointment as a real estate broker in that case because he would fail the disinterestedness requirement of 11 U.S.C. §327.

17. On the morning of June 3, 2004, between 10:00 a.m. and 11:00 a.m., another client of Price, Dave

Shepard ("Shepard"), called and asked Price to represent him at a hearing that afternoon in Alameda County Superior Court. Price agreed, even though he knew the debtor's Confirmation Hearing was set for 2:00 P.M. Price did not seek a continuance of that Superior Court hearing or the Debtor's Confirmation Hearing. Price did not otherwise inform this Court prior to the Confirmation leafing that he had a conflicting emergency hearing in Superior Court. Price attended the Superior Court hearing on June 3rd, but failed to appear at the Confirmation Hearing that afternoon.

18. The Debtor, however, did appear at the Confirmation Hearing and explained that a sale of her house was pending in escrow. The Court confirmed the Debtor's plan with a 100% payout to general unsecured creditors, with escrow to close in 60 days or the case would be dismissed. (*Confirmation Order*, Doc. 15). The Court also issued an order for Price to appear on July 8, 2004, (herein the "July 8th Hearing"), and show cause why he should not have to disgorge any compensation received from the Debtor for his failure to appear at the Confirmation Hearing and at the Meeting of Creditors. (*Order*, Doc. 16).

19. Thereafter, Price did not contact the Court, the Debtor, the Chapter 13 Trustee or check the Court docket to find out what happened to the Debtor's case at the Confirmation Hearing. Price assumed the Debtor's case had been dismissed, and made no attempt to set aside the presumed dismissal. Instead, he immediately sent the Debtor a letter dated June 4, 2004

(herein the "June 4 Letter," Court Ex. 1, attached) misstating that the Court had dismissed her bankruptcy case at the Confirmation Hearing and that Washington Mutual was therefore "free to proceed with the sale of our house." The June 4 letter also stated that a foreclosure sale was scheduled for June 10, 2004, and that "we can re-file another bankruptcy case or we can put your house on the market and, given the market, have a contract early next week and negotiate with your lender to postpone the sale to allow escrow to close." (*Id.*). The Debtor received the June 4 Letter a day or so later.

20. At about this time the Debtor received an unsolicited pamphlet in the mail from an unidentified attorney in Walnut Creek, California. The pamphlet described various options to avoid foreclosure, including refinancing an existing mortgage debt with an interest only loan. The Debtor contacted the Walnut Creek attorney and described her situation. He advised her to contact Price and "ask why he did this," and to also contact the Court and the Chapter 13 Trustee.

21. A few days after receipt of the June 4 Letter, the Debtor telephoned Price and asked him why he did not tell her in advance about the scheduled Confirmation Hearing, and why in the June 4 Letter he incorrectly stated that her case had been dismissed. Price responded that he was trying to get her to stop procrastinating and do something. During this conversation the Debtor told Price that she attended the Confirmation Hearing and what happened at that hearing. She also told Price, for the first time, that her house was sold pending the close of escrow.

22. At the conclusion of the July 8th Hearing, the Court ordered a $300 reduction in the $1,500 fee Price charged the Debtor for representing her in this bankruptcy case, due to his failure to appear at the Confirmation Hearing.

23. Later that day, the Court received a letter from the Debtor raising serious ethical issues regarding Price's handling of her bankruptcy case. Thereafter, the Court issued an order for Price to appear on July 26th and show cause why he should not be sanctioned and/or suspended or disbarred from practice before this Court for the conduct described in the Debtor's July 8, 2004 letter (Court Ex. A, letter dated July 8, 2004, attached). The Court also ordered the Debtor to appear at that hearing to testify as to the same.

24. On or about July 23, 2004, the sale of the Debtor's house was consummated for a purchase price of $390,000.

OPINION

A. Failure to Disclose and Obtain Debtor's Consent to Representation by a Non-Associated Appearance Attorney at the § 341 Meeting of Creditors

An attorney not associated or otherwise employed by the attorney or law firm representing a client may make a "special appearance" on behalf of that client, provided that prior to the special appearance the client's attorney discloses the anticipated use of the "appearance attorney" to the client and obtains the client's consent to

such an appearance.[2] *In re Wright*, 290 B.R. 145, 151-153 (Bankr. C.D. Cal. 2003) (Mund, C.J., with Greenwald, J. and Lax, J. joining in the conclusions of law). Such disclosure and consent is required if the appearance attorney's "involvement is a significant development." Whether the use of an appearance attorney constitutes a significant development depends upon the circumstances of the particular case. Relevant factors to consider include 1) whether responsibility for overseeing the client's matter is being changed; 2) whether the new attorney will be performing a significant portion or aspect of the work; or 3) whether staffing of the matter has been changed from what was specifically represented to or agreed with the client. *In re Wright*, 290 B.R. at 151-152, *citing State Bar of California Formal Ethics Opinion No. 1994-138*, 1994 WL 721969 at *5 (Cal. St. Bar Comm. Prof. Resp. 1994); *see also*, California Rule of Professional Conduct 3-500, and California Business & Professions Code §6068(m) (attorney shall keep client reasonably informed of significant developments related to employment and representation in matters attorney has agreed to provide legal services).[3]

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2. Other terms to describe an "appearance attorney" include a "contract attorney," a "temporary attorney" and a "stand-in attorney." *See, In re Wright*, 290 B.R., at 149-150; Berman, *Judge, This is Not My Case - Ethical Pitfalls Concerning Contract and Appearance Attorneys*, 5 Norton Bankruptcy Law Adviser 3, May 2004.

3. California Rule of Professional Conduct 3-500 states: "A member shall keep a client reasonably informed about significant developments relating to the employment or representation and promptly comply with reasonable requests for information." (Cont'd)

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The §341 meeting of creditors is a fundamental and significant event in a bankruptcy proceeding as it "usually presents the first opportunity for the Trustee, the United States Trustee, and he creditors to examine the debtor and to determine the accuracy of the debtor's schedules and prospects of creditors being paid." *Bone v. Judah (In re Josey)*, 195 B.R. 511, 513-514 (Bankr. N.D. Ga. 1996). The attorney representing a debtor is obligated to appear at the meeting of creditors with he debtor. *In re Castorena*, 270 B.R. 504, 530 (Bankr. D. Idaho, 2001) (to adequately represent a bankruptcy debtor, attorney representing debtor must attend the §341 meeting of creditors); *In re Bancroft*, 204 B.R. 548, 550-551 (Bankr. C.D. Ill. 1997) (attorney cannot apply his professional knowledge and skill without attending the first meeting of creditors, which is among the minimum services required for attorney to perform); *In re Josey*, 195 B.R. at 514 ("attorneys for debtors cannot adequately represent their clients if they fail to appear at the §341 meeting"). An attorney's standard fee in a Chapter 13 case may be subject to disgorgement as excessive for his failure to perform a Fundamental service such as representation of the debtor at the meeting of creditors. *Hale v. United States Trustee (In re Basham)*, 208 B.R. 926, 932 (9th Cir. BAP 1997),

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(Cont'd)

California Business and Professions Code §6068(m) provides: "It is the duty of an attorney to do all of the following: . . . (m) respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

aff'd 152 F.3d 924 (9th Cir. 1998) (standard fee paid to attorney disgorged for, *inter alia*, failure to appear at §341 meeting unless debtor paid him additional compensation to attend; an attorney "has an obligation to either handle the case from beginning to end . . . or refer it to the another attorney.").

Here, when Price signed and filed the *Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys*, he agreed to attend the Meeting of Creditors with the Debtor. (Doc. 10 at page 2-3). Moreover, when he signed and filed the required Rule 2016(b) *Disclosure of Compensation of Attorney for the Debtor*, Price certified and agreed to "representation of the debtor at the meeting of creditors." (Doc. 8, *Rule 2016(b) Statement*, attached as last page).[4] Prior to the Meeting of Creditors, Price did not tell the Debtor that he would

4. Rule 2016(b) requires that the attorney for the debtor disclose to the court and the UST any agreement to share compensation received from the debtor with any other person who is not a member or associate of the attorney's law firm. Commonly termed "fee splitting," such an arrangement is prohibited under 11 U.S.C. §504(a). *In re ACandS, Inc.*, 297 B.R. 395, 404-405 (Bankr. D. Del. 2003). Additionally, pursuant to California Rule of Professional Conduct 2-200(A), an attorney must disclose a fee sharing arrangement to the client in writing, and obtain the client's written consent to share the fee. *See, In re Wright*, at 151; *State Bar of California Formal Ethics Opinion No. 1994-138*, 1994 WL 721969 at *5 (Cal. St. Bar Comm. Prof. Resp. 1994). Here, however, nothing was presented to the Court regarding the arrangement between Price and Zamanski. But Price did state on his Rule 2016(b) statement that he did not agree to share compensation with another person.

not appear, nor did he obtain her consent for Zamanski to represent her at the Meeting of Creditors.

Particularly given the obvious inadequacies of the Debtor's plan and the potential equity in her house, the Meeting of Creditors was a fundamental and significant event in this case. By having Zamanski specially appear at the Meeting of Creditors, Price shifted the responsibility for a significant aspect of this case from himself to Zamanski. As such, Zamanski's involvement as an appearance attorney constituted a significant development, requiring Price to disclose it to the Debtor and obtain her consent for Zamanski's involvement prior to the Meeting of Creditors. Price failed to do so.

B. Neglecting to Inform the Debtor About and Failure to Appear at the Confirmation Hearing

An attorney has a duty to keep a client informed of important matters related to the attorney's representation of the client. Cal. Rule of Professional Conduct 3-500; Cal. Bus. & Professions Code §6068(m). An attorney's failure to communicate with a client and to use his best efforts to represent that client, constitute breaches of the duty owed by the attorney to the client and are grounds for discipline. *Hartford v. State Bar of California*, 50 Cal. 3d 1139, 1154 (1990), *citing Van Sloten v. State Bar of California*, 48 Cal. 3d 921, 932 (1989) and *Matthew v. State Bar of California*, 49 Cal. 3d 784 (1989), *see also*, *Layton v. State Bar of California*, 50 Cal.3d 889, 904 (1990) (failure to communicate with and inattention to needs of client, standing alone, constitute grounds for discipline).

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On March 19, 2004, the Chapter 13 Trustee served notice of the scheduled Confirmation Hearing by mail to the Debtor and Price. The Debtor testified she first learned that her appearance vas required at the Confirmation Hearing during a telephone conversation she had with the Chapter 13 trustee in late April, 2004, The Debtor further testified that Price never mentioned this requirement to her and did not send her any written correspondence concerning the Confirmation Hearing. In an attempt to contradict the debtor, Price submitted his telephone bills, (Exs. E and F attached to Price Ex. 2, Doc. 22), showing seven calls to the Debtor prior to the Confirmation Hearing Between April 5, 2004 and May 28, 2004. He testified that he called the Debtor on May 28, 2004 "trying to remind her of the Confirmation Hearing" but the Debtor did not return that call or others.[5]

While the testimony of Price and the Debtor conflict on this point, the Court finds the testimony of the Debtor more credible for two reasons. First, if Price did tell the Debtor to attend the Confirmation Hearing, then it is inconceivable that he would have failed to contact her to find out what transpired at the hearing before he wrote the June 4th Letter. Second, from the evidence submitted, and given Price's admitted difficulty reaching

5. Of these seven telephone calls, four are billed for one minute in duration including the May 28th call and the other three are for two, three and 15 minutes of time, Price testified that he sometimes would reach the Debtor's roommates and leave a message for the Debtor, but that he was not sure his messages were getting through to the Debtor.

the Debtor by telephone, it is extremely difficult to understand why he failed to mention the Confirmation Hearing in his April 27th Letter. Rather, the April 27th Letter recounts a meeting at his office on April 23, and focuses in a strident tone in her case being in jeopardy of dismissal and that a foreclosure sale on her house could possibly go forward without the Debtor knowing about it if her case were dismissed. (Price Ex. 3, attached). This Court concludes that Price failed to inform the Debtor that she was required to attend the Confirmation Hearing.

Rule 3-110(A) of the Rules of Professional Conduct "prohibits an attorney from intentionally, with recklessly disregard, or repeatedly failing to perform legal services competently." *In the Matter of Dixon*, 4 Cal. State Bar Ct. Rptr. 23, 1999 WL 562767 at *2 (Cal. Bar Ct. March 15, 1999).[6] An attorney representing a bankruptcy debtor has a core obligation to appear as the debtor's counsel of record and represent the debtor. *In re Casterona*, 270 B.R. at 530.

From the evidence presented, the court finds that Dave Shepard was an important and long-standing client of Price. In a case titled *Shepard v. Warren*, Alameda County Superior Court case Lumber WG-04-144996, Shepard obtained an unlawful detainer judgment by default against certain of his tenants (herein the "Default Judgment") without Price's

6. Rule 3-110(A) states: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

assistance. Thereafter, on shortened time, Shepard's former tenants obtained a hearing on a Motion to Set Aside the Default Judgment, set or June 3, 2004 before the Honorable Steven Brick in Department 31 of the Alameda County Superior Court. Shepard didn't think he could appear at that hearing without legal counsel, so on the morning of June 3rd, at sometime between 10:00 a.m. and 11:00 a.m., Shepard called Price and asked him to appear that afternoon at the Superior Court hearing.

The Order Shortening Time scheduling that hearing, the Proof of Service for that Order Shortening Time, the Notice of that hearing, and the Declaration of W. Damian Rickert filed in support of the Motion to Set Aside the Default Judgment, all state that the hearing on that Motion was scheduled for June 3rd at 2:00 p.m. in Department 31 of the Alameda County Superior Court before Judge Brick. (*See*, Superior Court pleadings attached to Doc. 23, *Supp. Resp. of Price to Order to Show Cause*, and also attached to the *Shepard Declaration*, Ex. A to Price Ex. 2, *Response to Order to Show Cause*, Doc. 22). Price knew that the Debtor's Confirmation Hearing was scheduled at exactly the same hour on that date. At the July 26 Hearing, when questioned about why Price thought he could attend both hearings in two different locations at the same date and time, he testified that the noticed 2:00 p.m. time for the hearing in the Superior Court was "incorrect," that it was actually at 1:30 p.m., that he was at the Superior Court at 1:30 p.m. on June 3rd, and further that given the 30 minute interval he was

"ambitious . . . and optimistic . . . . I could get them both [hearings] done that day." Price's testimony as to this matter is not credible.

The Civil Law and Motion Hearing Schedule posted on the Alameda County Superior Court website for Department 31, of which this Court takes judicial notice, provides that Judge Brick hears such matters in even numbered cases, such as *Shepard v. Warren*, case number WG-04-144996, weekdays at 2:00 p.m. (Court Ex. 2, attached). More significantly, a copy of Judge Brick's Civil Law and Motion Calendar for June 3, 2004, of which this Court also takes judicial notice, shows that the "Motion to Vacate/Set Aside Default" in *Shepard v. Warren*, was scheduled for 2:00 p.m. that day and was number 14 on that calendar. (Court Ex. 3, attached). Finally, it is ludicrous, and not merely a "wrong judgment call" as Price testified, for Price to suggest that he could attend both hearings on time, even if the Superior Court hearing did start at 1:30.[7]

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7. Price also testified at the July 26th Hearing that the hearing on the Motion to Set Aside the Default Judgment had to be at 1:30 p.m. in the Superior Court because it was an *ex parte* matter and that is when the Superior Court hears such matters. The facts appear to be otherwise on this point as well. First, although the earlier Order Shortening Time to schedule a hearing on the Motion to Set Aside the Default Judgment was requested *ex parte*, the Superior Court pleadings, the Civil Law and Motion Hearing Schedule, and Judge Brick's Civil Law and Motion Calendar show that the actual hearing on the Motion to Set Aside the Default Judgment was not *ex parte*.

(Cont'd)

Accordingly, Price knew possibly as early as the morning of June 3rd, or before then, and certainly by 1:30 p.m. that afternoon, that he was not going to appear in time for the Confirmation Hearing. As such, Price had ample time to do something to address this conflict, such as seek a continuance of either hearing—a telephone call to this Court explaining an emergency might have accomplished that— or at least inform the Court of the conflict and that he may arrive late for the Confirmation Hearing, Instead, he chose to do nothing, His reasons for doing nothing—that he left is cell phone in his car and that his assistant was out of the office—are not credible, and in any event do not excuse his failure to act responsibly in representing the Debtor. *See, In re La France*, 311 B.R. 1, 24 (Bankr. D. Mass. 2004) (absence of paralegal did not excuse attorney's lapses). This Court finds that Price intentionally failed to appear at the Confirmation Hearing.

(Cont'd)

(*See*, Superior Court pleadings attached to Doc. 23, *Supp. Resp. of Price to Order to Show Cause*, and also attached to the *Shepard Declaration*, Ex. *A* to Price Ex. 2, *Response to Order to Show Cause*, Doc. 22; Court Exs. 2 and 3). Second, even if it was an *ex parte* matter, the Civil Law and Motion Hearing Schedule posted on the Alameda County Superior Court website for Department 31 provides that Judge Brick hears *ex parte* matters weekdays at 8:45 a.m. (Court Ex. 2).

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C. Price's Solicitations To Be Hired As The Debtor's Real Estate Broker, and Valuation of the Debtor House Conflicted With His Duties Owed to the Debtor

The relationship of an attorney to a client is of the highest fiduciary character. *State Bar of California Formal Ethics Opinion No. 1996-147*, 1996 WL 664854 at *2 (Cal. St. Bar Comm. Prof. Resp. 1996); *McDaniel v. Gile*, 230 Cal. App. 3d 363, 373, 281 Cal. Rprt. 242, 247 (1991). The obligation of fidelity precludes an attorney from assuming a relationship which would interfere with the attorney devoting himself entirely to the client's best interests. It does not matter that the intention and motives of the attorney in assuming such a relationship are honest. *Anderson v. Eaton*, 11 Cal. 113, 116 (1930). An attorney violates his duty to protect his client when the attorney assumes a relationship "where he may be required to choose between conflicting duties." *Klemm v. Superior Court*, 75 Cal. App. 3d 893, 902 (1977).

A conflict of interest is generally defined as a situation that interferes with a lawyer's ability to fulfill basic duties to a client. Those basic duties include the representation of a client with undivided loyalty and exercising independent judgment on a client's behalf. These duties require a lawyer to tender legal representation for the benefit of the client and to exercise judgment free of influences that are extraneous to the lawyer-client relationship. *State Bar of California Formal Ethics Opinion No. 2002-158*, 2001 WL

34029612 at *3 (Cal. St. Bar Comm, Prof. Resp. 2002); *State Bar of California Formal Ethics Opinion No. 1995-141*, 1995 WL 530260 at *3 (Cal. St. Bar Comm. Prof. Resp. 1995); *Anderson v.* Eaton, 211 Cal, at 116. The burden is upon the attorney to show that his dealings with his client are fair in all respects. *Clark v. Millsap*, 197 Cal. 765, 785 (1926).

A solicitation is any communication regarding professional employment for pecuniary gain. California Rule of Professional Conduct 1-400(B). Price solicited the Debtor at least five times to be employed as a real estate broker to list her house for sale: 1) at the August 23, 2003 meeting at Price's office; 2) at the April 23, 2004 meeting when he encouraged her to list the house at $340,000 "as is" for a quick sale; 3) in his April 27th Letter to the Debtor, recounting their April 23rd meeting and stating that "[i]f you want to amend the plan . . . to borrow money to fix up the house and sell, let me know. If you just want to list [it] for sale 'as is,' let me know;" 4) in the June 4th Letter; and 5) when Price viewed the Debtor's house and decided that it should list for $340,000 to $345,000 for a quick sale, even though he was told by the Debtor that similar houses in the neighborhood sold for more.[8]

8. In addition to these persistent and repeated solicitations directly from Price, the Debtor was also confronted with the loan condition from Bosivert that she retain Price as her real estate broker. Bosivert's declaration that this loan condition stemmed from his desire to have Price's professional experience "involved to increase the probability attic plan being

(Cont'd)

Appendix C

Price asserts that State Bar Ethics Opinion 1982-69 permits him ethically to represent the Debtor as her attorney and also as her real estate broker at the same time, provided he conforms to the standards of both professions, with full disclosure to the Debtor and with her informed consent to his dual representation. *State Bar of California Formal Ethics Opinion No. 1982-69*, 1982 WL 31793 at *1 (Cal. St. Bar Comm, Prof. Resp. 1982). Price is mistaken.

While State Bar Ethics Opinion 1982-69 allows for such dual representation generally, it cautions that ethically there are "substantial risks" for an attorney actually taking on both roles simultaneously. (*Id.*) both the rule and the risks were ignored in this case, From the inception of their attorney-client relationship, Price consistently solicited the Debtor to employ him as her real estate broker. When Price contacted the UST toward the end of May 2004, because "he anticipated to might be hired as a broker," he was told that his dual representation might pose a problem. As such, Price was on notice prior to the Confirmation Hearing and before he mailed the June 4th Letter that there was a serious problem in serving as the Debtor's real estate

(Cont'd)

completed" and Price's similar testimony at the July 26th Hearing, are not credible. Price, as the Debtor's attorney was already a professional involved in the matter. Moreover, that Bosivert independent of Price would insist on Price as the Debtor's real state broker, when Price testified and Bosivert declared that neither had met the other before Price contacted Bosivert in search of 2004, stretches the bounds of believability.

broker as long as she was a debtor in bankruptcy. Dismissal of the Debtor's bankruptcy case would resolve that conflict. At best, the June 4th Letter is a particularly heinous example of Price's attempts to pressure the Debtor into hiring him as her real estate broker. At worst, it reveals a premeditated plan to engineer the dismissal of the Debtor's case and thus improve his chances of serving as the Debtor's real estate broker.

Price was duty-bound to devote his undivided loyalty and exercise his independent judgment, free of influences outside of the attorney-client relationship, on behalf of the Debtor. This Court finds that while representing the Debtor as her attorney, Price's numerous solicitations to serve as the Debtor's real estate broker, his cavalier valuation of her house for a quick sale, and his failure to focus solely on representing the Debtor in her bankruptcy case, conflicted with his duties to act with undivided loyalty and exercise independent judgment on behalf of the Debtor's best interests, In a word, his conduct in this case was outrageously improper, unprofessional and unethical under any reading of California's ethical standards for attorneys.

Appendix C

CONCLUSIONS OF LAW

1. Price violated California Rule of Professional Conduct 3-500, and California Business & Professions Code §6068(m), when he failed to disclose to the Debtor that Zarnanski would appear and represent her at the Meeting of Creditors, and when he failed to obtain the Debtor's consent to Zarnanski's representation of her at the Meeting of Creditors.

2. Price violated California Rule of Professional Conduct 3-500, and California Business & Professions Code §6068(m), when he failed to inform the Debtor of the Confirmation Hearing.

3. Price violated California Rule of Professional Conduct 3-110(A), when he intentionally failed to appear and represent the Debtor at the Meeting of Creditors and the Confirmation Hearing.

4. Price violated the basic duties an attorney owes to a client; to represent the Debtor with undivided loyalty, to exercise independent judgment on the Debtor's behalf, and to act in the Debtor's best interests.

Appendix C

CONCLUSION

Upon consideration of the foregoing, this Court hereby orders Price, within 20 days of the filing date of these Findings of Fact, Opinion, and Conclusions of Law, to disgorge to the Debtor the entire balance of the $1,500 fee he was paid in this case. In light of the egregious nature of Price's conduct, the Court further finds it appropriate to suspend Price from the practice of law in the United States Bankruptcy Court for the Northern District of California for a period of three months, effective October 22, 2004. This suspension shall not apply to cases and adversary proceedings already filed in which Price has already made an appearance as the attorney of record. A copy of these Findings of Fact, Opinion, and Conclusions of law shall be forwarded to the California State Bar Association for is review and consideration.

IT IS SO ORDERED

s/ Randall J. Newsome
Randall J. Newsome, Chief Judge
United States Bankruptcy Court

[*Exhibits intentionally omitted*]

APPENDIX D — RELEVANT STATUTES AND RULE

28 U.S.C. § 157

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the

bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

Appendix D

28 U.S.C. § 158

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

(A) there are insufficient judicial resources available in the circuit; or

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2)(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)(1) Subject to subsections (b) and (d)(2), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless—

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal;

to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district

court, or bankruptcy appellate panel, or the court of appeals in which the appeal in pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

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28 U.S.C. § 2075

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11.

Such rules shall not abridge, enlarge, or modify any substantive right.

The Supreme Court shall transmit to Congress not later than May 1 of the year in which a rule prescribed under this section is to become effective a copy of the proposed rule. The rule shall take effect no earlier than December 1 of the year in which it is transmitted to Congress unless otherwise provided by law.

The bankruptcy rules promulgated under this section shall prescribe a form for the statement required under section 707(b)(2)(C) of title 11 and may provide general rules on the content of such statement.

Appendix D

U.S.Dist.Ct.Rules N.D.Cal., Civil L.R. 11-6

(a) General. In the event that a Judge has cause to believe that an attorney has engaged in unprofessional conduct, the Judge may do any or all of the following:

(1) Initiate proceedings for civil or criminal contempt under Title 18 of the United States Code and Rule 42 of the Federal Rules of Criminal Procedure;

(2) Impose other appropriate sanctions;

(3) Refer the matter to the appropriate disciplinary authority of the state or jurisdiction in which the attorney is licensed to practice;

(4) Refer the matter to the Court's Standing Committee on Professional Conduct; or

(5) Refer the matter to the Chief Judge for her or him to consider whether to issue an order to show cause under Civ. L.R. 11-7.

(b) "Attorney" Defined. For purposes of Civil L.R. 11-6, the term "attorney" may include law corporations and partnerships, when the alleged conduct occurs in the course and scope of employment by the corporation or partnership, and includes attorneys admitted to practice in this Court pro hac vice pursuant to Civil Local Rule 11-3.

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(c) Standing Committee on Professional Conduct. The Court will appoint as Special Masters for Disciplinary Proceedings pending before the Court, a Standing Committee on Professional Conduct consisting of seven members of the bar and designate one of the members to serve as Chair of the Committee. The members of the Committee shall continue in office for a period of 4 years. Members shall serve staggered terms, with four of the first appointees serving for 2 years and three members serving for 4 years.

(d) Discipline Oversight Committee. The Chief Judge shall appoint three (3) or more Judges to a Discipline Oversight Committee which shall oversee the administration of this Local Rule.

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No. 09-113

In the Supreme Court of the United States

JIM G. PRICE, PETITIONER

v.

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES TRUSTEE IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
WILLIAM KANTER
ROBERT D. KAMENSHINE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, based on petitioner's breach of professional legal ethics in the course of a bankruptcy case, the bankruptcy court had the authority to suspend him from practicing before it for three months.

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BRIEF FOR THE UNITED STATES TRUSTEE IN OPPOSITION[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 564 F.3d 1052. The opinion of the bankruptcy appellate panel (Pet. App. 19a-44a) is reported at 332 B.R. 404. The opinion of the bankruptcy court (Pet. App. 45a-70a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2009. The petition for a writ of certiorari was

[1] Although the petition for a writ of certiorari does not identify the United States Trustee as a party to the case, the United States Trustee was a party in the court of appeals, see Pet. App. 1a, and is therefore a party to the proceedings in this Court under Supreme Court Rule 12.6.

filed on July 24, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In late 2003, debtor Patricia Lehtinen retained petitioner to represent her in filing for bankruptcy. Lehtinen told petitioner that she wanted to secure a home improvement loan, perform various repairs on her house, and then sell the house to repay debts. Petitioner offered to serve as her attorney in filing the bankruptcy petition and as her real estate broker in listing her house for sale. In December 2003, with petitioner's assistance, Lehtinen filed for bankruptcy under Chapter 13. Pet. App. 47a-48a.

Pursuant to their retention agreement, petitioner agreed to attend the meeting of creditors held pursuant to 11 U.S.C. 341. On February 19, 2004, Lehtinen attended that meeting, but petitioner did not attend. Rather, petitioner sent in his stead another attorney who was not a member of his firm. Pet. App. 48a. Petitioner did not notify Lehtinen that he would be absent from the meeting, nor did he secure her consent to another attorney's appearance. *Ibid.*

In March and April 2004, petitioner advised Lehtinen to list her house for $340,000 to $345,000 in order to induce a quick sale. Pet. App. 50a-51a. Meanwhile, petitioner arranged for Lehtinen to receive a home improvement loan, but the mortgage company conditioned the loan on Lehtinen's using petitioner as her broker. *Id.* at 49a-50a. Lehtinen decided to list the house through another broker without performing any improvements, and shortly thereafter she accepted an offer for $390,000. *Id.* at 52a.

On June 3, 2004, Lehtinen attended the confirmation hearing, but petitioner again did not attend. Pet. App. 52a-53a. Petitioner was absent because he had agreed to represent another client at a hearing that afternoon in a different courthouse. *Id.* at 53a. The bankruptcy court confirmed Lehtinen's plan, but it also issued an order for petitioner to appear at a hearing on July 8, 2004, and show cause why he should not be required to disgorge any compensation received from Lehtinen for his failure to attend the creditors' meeting and confirmation hearing. *Ibid.* The next day, on June 4, 2004, petitioner sent Lehtinen a letter stating that her case had been dismissed at the confirmation hearing—a statement that was not true and that petitioner had made no attempt to verify. *Id.* at 53a-54a.

At the July 8 hearing, the bankruptcy court ordered petitioner to reduce by $300 the fee of $1500 that he had charged Lehtinen for representing her in the bankruptcy case. Pet. App. 55a. After receiving a letter from Lehtinen describing petitioner's conduct in greater detail, however, the court issued an order for petitioner to appear for a second hearing on July 26, 2004. *Ibid.* The order identified four instances of petitioner's alleged misconduct, and stated that "the facts point to a clear conflict of interest between [petitioner] acting as the debtor's lawyer, soliciting the debtor to use his services as a real estate broker, and serving as a loan broker." *Id.* at 5a (internal quotation marks and citation omitted). The order therefore required petitioner to show cause "why [he] should not be sanctioned pursuant to this court's inherent sanction power * * * for bad faith conduct" and "why he should not be suspended or disbarred from practice in this court." *Id.* at 4a (internal quotation

marks omitted). The court also ordered Lehtinen to appear and testify at the hearing. *Ibid.*

2. a. Following the July 26 hearing, the bankruptcy court determined that petitioner had violated several provisions of the California Business & Professions Code and the California Rules of Professional Conduct. Pet. App. 45a-70a; see *id.* at 69a. The court found that petitioner had intentionally failed to appear at the creditors' meeting and confirmation hearing, *id.* at 59a, 64a, and had pressured Lehtinen to hire him as her real estate broker, *id.* at 68a. The court stated that petitioner's "conduct in this case was outrageously improper, unprofessional and unethical under any reading of California's ethical standards for attorneys." *Ibid.* The court therefore ordered petitioner "to disgorge to [Lehtinen] the entire balance of the $1,500 fee he was paid in this case." *Id.* at 70a. Moreover, "[i]n light of the egregious nature of [petitioner's] conduct," the court suspended petitioner "from the practice of law in the United States Bankruptcy Court for the Northern District of California for a period of three months," with the exception of any "cases and adversary proceedings already filed in which [petitioner] has already made an appearance as the attorney of record." *Ibid.* Petitioner appealed and obtained a stay of his suspension. *Id.* at 5a.

b. The bankruptcy appellate panel held that the bankruptcy court had authority to sanction petitioner, but it vacated the portion of the bankruptcy court's order that suspended petitioner from practice, and it remanded for further proceedings to reconsider the appropriate sanction. Pet. App. 19a-44a. The panel concluded that "the bankruptcy court could discipline" petitioner, and that the court had "afforded [petitioner] due process." *Id.* at 30a. In the panel's view, petitioner "ha[d]

not shown that the bankruptcy court clearly erred in its factual findings, nor that it lacked clear and convincing evidence." *Ibid.* But while the panel determined that "discipline was appropriate," *ibid.*, it remanded the case so that the bankruptcy court could "consider the ABA Standards in determining the appropriate sanction," *id.* at 31a. See *id.* at 44a ("[T]he record does not disclose that the court considered all appropriate factors in determining what sanction to impose.").

c. The court of appeals affirmed the order of the bankruptcy appellate panel. Pet. App. 1a-18a. Although the decision under review was non-final, the court of appeals found that it possessed jurisdiction because the appeal presented a question of law, *i.e.*, whether the bankruptcy court had authority to sanction petitioner. *Id.* at 6a. On the merits, the court of appeals held that bankruptcy courts possess inherent power to sanction attorneys appearing before them for bad faith or willful misconduct. *Id.* at 8a-11a. The court further held that petitioner had received adequate notice of the possible suspension, *id.* at 12a-15a, and that the Northern District of California Civil Local Rules did not require the bankruptcy court to refer the suspension action to a standing committee, *id.* at 16a-18a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. a. As a threshold matter, there is a substantial question whether the court of appeals had jurisdiction to hear petitioner's appeal. The bankruptcy appellate panel vacated the decision of the bankruptcy court and remanded for that court to "consider[] all appropriate fac-

tors in determining what sanction to impose." Pet. App. 44a. Ten courts of appeals have held that "a decision by the district court on appeal remanding the bankruptcy court's decision for further proceedings in the bankruptcy court is not final, and so is not appealable * * * , unless the further proceedings contemplated are of a purely ministerial character." *In re Lopez*, 116 F.3d 1191, 1192 (7th Cir.), cert. denied, 522 U.S. 1014 (1997); see *id.* at 1192 (citing cases from eight other courts of appeals); see *In re Swegan*, 555 F.3d 510, 512 (6th Cir. 2009).

The Third and Ninth Circuits, however, have adopted a more liberal approach to appealability. See, *e.g.*, *United States Trustee* v. *Gryphon at the Stone Mansion, Inc.*, 166 F.3d 552, 556 (3d Cir. 1999). As relevant here, the Ninth Circuit has held that it possesses "jurisdiction over a non-final order in a bankruptcy case where 'the appeal concerns primarily a question of law.'" Pet. App. 6a (quoting *DeMarah* v. *United States*, 62 F.3d 1248, 1250 (9th Cir. 1995)). This Court would be required to consider that jurisdictional issue if it granted the petition, see *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986), and the Court might ultimately conclude that it could not reach the merits of petitioner's claims, see *United States* v. *Corrick*, 298 U.S. 435, 440 (1936).

b. At the least, the non-final nature of the decision below counsels against further review at this time. The remand by the bankruptcy appellate panel leaves open the possibility that the bankruptcy court will not suspend petitioner once it "consider[s] all appropriate factors." Pet. App. 44a. In the event that petitioner is again suspended, he may raise his current claims—together with any other claims that might arise during

the proceedings on remand—in a new petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001). Accordingly, review by this Court would be premature at this time.

2. a. On the merits, petitioner argues (Pet. 3-5) that bankruptcy courts lack inherent authority to sanction the bad faith misconduct of attorneys who appear before them. That contention lacks merit. This Court's precedents have "recognized the 'well-acknowledged' inherent power of a court to levy sanctions in response to abusive litigation practices." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 765 (1980) (citing *Link* v. *Wabash R.R.*, 370 U.S. 626, 632 (1962)). "It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)).

"A primary aspect" of a court's inherent powers is "the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers*, 501 U.S. at 44-45. A court thus confronted with a party's bad faith misconduct in the course of proceedings has the discretion to respond with a variety of sanctions. *Id.* at 45. And just as courts can sanction parties for their bad faith conduct, so too can courts can sanction parties' counsel for the same types of misconduct. *Roadway Express*, 447 U.S. at 766 ("The power of a court over members of its bar is at least as great as its authority over litigants."). Here, the bankruptcy court imposed a sanction—suspending petitioner from accepting new cases before that court for three months—less

severe than others that have been upheld as within courts' inherent authority. *Chambers*, 501 U.S. at 45.

A clear expression of congressional intent is required to displace a court's inherent power to sanction bad faith conduct. *Chambers*, 501 U.S. at 47. The Bankruptcy Code, far from displacing the inherent powers of courts, expressly recognizes the bankruptcy court's authority to sanction litigants for abusive litigation practices. The Code states that "[n]o provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or *to prevent an abuse of process*." 11 U.S.C. 105(a) (emphasis added); see 132 Cong. Rec. 28,610 (1986) (statement of Sen. Hatch) (Section 105(a) "allows a bankruptcy court to take any action on its own, or to make any necessary determination to prevent an abuse of process and to help expedite a case in a proper and justified manner.").

Accordingly, it is well established that bankruptcy courts have the power to sanction parties or counsel for bad faith conduct in bankruptcy proceedings. See, *e.g.*, *In re Sunshine Jr. Stores, Inc.*, 456 F.3d 1291, 1304-1306 (11th Cir. 2006); *In re DeVille*, 361 F.3d 539, 548-551 (9th Cir. 2004); *In re Rimsat, Ltd.*, 212 F.3d 1039, 1046-1049 (7th Cir. 2000); *Pearson* v. *First N.H. Mortgage Corp.*, 200 F.3d 30, 42 n.7 (1st Cir. 1999); *Weiss* v. *First Citizens Bank & Trust Co.*, 111 F.3d 1159, 1171-1172 (4th Cir.), cert. denied, 522 U.S. 950 (1997); *Mapother & Mapother, PSC* v. *Cooper*, 103 F.3d 472, 477 (6th Cir. 1996); *In re Huckfeldt*, 39 F.3d 829, 832 (8th Cir. 1994); *Citizens Bank & Trust Co.* v. *Case*, 937 F.2d 1014, 1023-1024 (5th Cir. 1991). Petitioner identifies no

decision holding that bankruptcy courts lack such authority.

b. Petitioner's reliance (Pet. 3, 5-6) on *In re Sheridan*, 362 F.3d 96 (1st Cir. 2004), is misplaced. In *In re Sheridan*, the bankruptcy court did not sanction counsel in the course of an ongoing bankruptcy case. *Id.* at 107. Rather, the court presided over an omnibus disciplinary proceeding to investigate potential ethical violations that spanned many closed bankruptcy cases. *Ibid.* Absent the consent of the parties, however, a bankruptcy court may enter a final judgment only with respect to "core" proceedings, or proceedings related to the administration of a bankruptcy case. *Id.* at 99-100 (citing *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 86-87 (1982)). The First Circuit held in *In re Sheridan* that the omnibus disciplinary action involved in that case was not a core proceeding, and thus "in th[o]se particular circumstances[] the bankruptcy court was not empowered to arrive at a *final* resolution of the disciplinary matter absent further district court participation and oversight." *Id.* at 110.

Nothing in *In re Sheridan* casts doubt on the result in the present case. As the court of appeals concluded, "[t]he circumstances here are clearly different," Pet. App. 7a n.1, because the bankruptcy court sanctioned petitioner for his bad faith misconduct in the context of an ongoing bankruptcy case. The First Circuit in *In re Sheridan* "d[id] not question that the case law overwhelmingly suggests that the bankruptcy court possesses the requisite authority, either inherent or statutory, to regulate its bar as necessary and appropriate." 362 F.3d at 110. For that reason, the First Circuit made explicit that its opinion did not extend to other types of disciplinary proceedings, including proceedings con-

ducted during the course of a bankruptcy case. *Id.* at 111.[2]

c. Petitioner is also incorrect in arguing (Pet. 6-7) that the bankruptcy court acted in violation of the Northern District of California Civil Local Rules. As the court of appeals explained, see Pet. App. 17a, Civil Local Rule 11-6(a)(2) permits bankruptcy courts, *inter alia*, to "[i]mpose other appropriate sanctions" for attorney misconduct. In electing to suspend petitioner from bringing new bankruptcy cases in the Northern District for three months, rather than to initiate contempt proceedings or refer petitioner to the California Bar, the bankruptcy court imposed the sort of "other appropriate sanctions" contemplated by Civil Local Rule 11-6(a)(2). The lower courts' interpretation of their own Rules does not warrant this Court's review. And because the court of appeals affirmed the order of the bankruptcy appellate panel, which remanded the case to the bankruptcy court to reconsider the appropriate sanction, further review of the specific sanction that was previously imposed would be premature at this time. See pp. 6-7, *supra*.

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[2] Although the court of appeals considered and rejected petitioner's contention (Pet. 5) that his disciplinary hearing was not a core proceeding, see Pet. App. 6a-7a & n.1, the bankruptcy appellate panel declined to consider that argument on the ground that "[petitioner] ha[d] waived any issue respecting the core or non-core nature of the disciplinary proceeding." *Id.* at 27a; see *id.* at 27a-28a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
WILLIAM KANTER
ROBERT D. KAMENSHINE
Attorneys

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